Indian Claims Commission

Kahkewistahaw First Nation

Report on: Treaty Land Entitlement Inquiry

NOVEMBER 1996

Indian Claims Commission

Commission des revendications des Indiens

November 26, 1996

Chief and Council
Kahkewistahaw First Nation

The Honourable Ron Irwin
Minister of Indian Affairs and Northern Development

The Honourable Allan Rock
Minister of Justice and Attorney General of Canada

Re: Kahkewistahaw First Nation
Treaty Land Entitlement

The Kahkewistahaw First Nation initiated proceedings before this Commission by letter dated June 1, 1994, from Stephen Pillipow, Counsel for the Kahkewistahaw First Nation, to the Commissioners of the Indian Claims Commission. On September 2, 1994, the Commission advised the Government of Canada and the Chief and Council of the Kahkewistahaw First Nation that it would conduct an inquiry into the Government's rejection of the specific claim of this First Nation.

This inquiry deals with the issue of outstanding treaty land entitlement pursuant to Treaty 4, for the Kahkewistahaw First Nation in Saskatchewan. The Commission has reviewed hundreds of pages of documents related to this inquiry. By agreement of the parties, it was determined that a community session was not required in relation to the present inquiry. However, on May 24 and 25, 1995, the panel held a joint expert session in Saskatoon, Saskatchewan, with representatives from the Kahkewistahaw, Kawacatoose and Ocean Man First Nations. On February 22, 1995, the Commissioners heard oral submissions from counsel for the parties on the legal issues raised in this inquiry.

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Our review of the history of this claim, and our analysis, findings, and recommendation are contained in the attached report which we are now honoured to present to you.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC
Commission Co-Chair

Carole T. Corcoran
Commissioner

102-02624/

INDIAN CLAIMS COMMISSION

INQUIRY INTO THE TREATY LAND ENTITLEMENT CLAIM OF THE KAHKEWISTAHAW FIRST NATION

PANEL

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November 1996

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EXECUTIVE SUMMARY

The Indian Claims Commission has been asked to inquire into whether the Government of Canada properly rejected the treaty land entitlement claim of the Kahkewistahaw First Nation. The general issue considered by the Commission was whether Canada set aside enough reserve land for Kahkewistahaw under the terms of Treaty 4. The unusual facts of the case, however, required us to clarify the process by which those individuals entitled to be counted in establishing a band's treaty land entitlement are identified. More particularly, we were required to determine the date as of which a band's treaty land entitlement is to be calculated, and the appropriate treaty annuity paylist to use as the starting point in actually calculating that entitlement.

Kahkewistahaw adhered to Treaty 4 in 1874, and, in the ensuing seven years, surveyors were sent out on three separate occasions to survey a reserve for the First Nation. William Wagner surveyed an area of 41,414 acres in 1876, but neither party contended that this survey should form the basis of calculating Kahkewistahaw's treaty land entitlement. The evidence shows that the First Nation never lived on or used the land surveyed by Wagner, and thus never accepted this land as its reserve.

Allan Poyntz Patrick and his assistant, William Johnson, were commissioned in 1880 to survey the reserves of those bands desiring them. Kahkewistahaw requested that a reserve be surveyed for his people, but, although Patrick's correspondence indicates that survey work was done, no plan of survey documenting these efforts has ever been located. The Commission concluded that Patrick and Johnson started, but likely did not complete, the survey of Kahkewistahaw's reserve in 1880.

Finally, in 1881, John C. Nelson surveyed the two areas that were eventually confirmed by Order in Council on May 17, 1889, as Kahkewistahaw Indian Reserves (IR) 72 and 72A. IR 72 comprised 73 square miles (46,720 acres) located roughly 130 kilometres east of Regina on the south shore of the Qu'Appelle River between Crooked Lake and Round Lake. When compared to the land that the expert witnesses speculated had been surveyed by Patrick and Johnson the previous year, Nelson's survey added or substituted an area of 20 to 25 square miles. The reasons given by Nelson for including this area were to provide the First Nation with timber, access to the Qu'Appelle River, and agricultural land on which it had already commenced farming. Nelson also surveyed IR 72A containing 96 acres on the north shore of Crooked Lake to provide the First Nation with access to a productive fishery. In total, Kahkewistahaw received 46,816 acres of land, sufficient for 365 people under the Treaty 4 formula of 128 acres per person.

The complicating factor in this context was the First Nation's wildly fluctuating population during the relevant period. According to the treaty annuity paylists, the number of people paid with Kahkewistahaw grew from 65 in the year of treaty to 266 in 1876, 376 in 1879 and 430 in 1880. The population then fell sharply to 186 in 1881 and 160 in 1882, before rebounding to 274 in 1883.

The evidence indicates that these were very difficult times for Kahkewistahaw and other bands in the Qu'Appelle Valley. Many Indian people were unsure whether their futures were best assured by maintaining their traditional nomadic way of life or by converting to agriculture. In 1881 large numbers of people migrated from the reserves to the Cypress Hills to pursue the buffalo, but by 1882 the federal government was actively discouraging Indians from remaining in the area. Although some people – notably Nekaneet and his followers – remained in the Cypress Hills,

the federal government in 1883 refused to continue paying treaty annuities there, and therefore many Indians returned to the reserves.

KAHKEWISTAHAW FIRST NATION'S POSITION

It was in the context of this background that Kahkewistahaw submitted its claim for outstanding treaty land entitlement to Canada on May 20, 1992. The First Nation claimed that it settled on its reserve in late August or early September 1880 and that the survey process, even if not *completed* in 1880, was at least *commenced* that year. Arguing that Canada and a band would have to assess the size and location of the reserve *before* the survey actually took place, Kahkewistahaw submitted that the most appropriate date for calculating a band's treaty land entitlement is the date on which the reserve lands were *selected*, and not the date on which the survey was *completed*.

The First Nation also contended that the most appropriate treaty annuity "base paylist" to use in calculating the entitlement is either the paylist immediately preceding the date of entitlement, or the paylist on which it can be shown that the surveyor actually relied in fixing the area of land to be surveyed. Regardless of whether the selection of land took place in 1880 or 1881, the First Nation argued that the selection occurred *before* the payment of treaty annuities on August 4, 1881, and that the appropriate base paylist is therefore the paylist of July 18, 1880.

Finally, Kahkewistahaw submitted that it had substantiated its treaty land entitlement claim on "the same or substantially the same basis" as the neighbouring Cowessess and Ochapowace First Nations, and thereby qualified to have its claim validated and settled under the terms of the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement (the Framework Agreement). Ochapowace is

an "Entitlement Band" as defined in the agreement, and both Ochapowace and Cowessess have settled their outstanding treaty land entitlement claims.

CANADA'S POSITION

Canada submitted that it is not possible to assess whether a given band's treaty land entitlement has been fulfilled until it receives land which is capable of being termed a "reserve." The survey work in 1880 by Patrick and Johnson did not satisfy this criterion because it did not result in the creation of a reserve.

Even if it might be maintained that the date of selection is the appropriate date for calculating a band's treaty land entitlement, Canada argued that the selection in this case involved an ongoing process of negotiation, which resulted in significant changes by Nelson in 1881 to the land base chosen in 1880. However, Canada also argued that it is more appropriate to use the date of first survey than the date of selection as the date for calculating treaty land entitlement, since it is not until a survey is completed that it can be determined whether the survey has been performed in accordance with treaty and is acceptable to both Canada and the band. Nelson's 1881 survey was clearly completed, but it was also accepted by Kahkewistahaw's people who have continued to live on and use that land to the present day. They did not accept the suggested 1880 survey since they had already commenced farming on other land by the time Nelson arrived in 1881.

With respect to the appropriate treaty annuity paylist to use as Kahkewistahaw's base paylist, Canada contended that the 1881 paylist represents the most reliable evidence of the First Nation's population at the date of first survey. Canada also argued that it would be inappropriate to use the 1880 paylist because doing so would result in a number of people who had migrated to the

Cypress Hills, and who had received their treaty land entitlement there, being counted twice for treaty land entitlement purposes.

Regarding Kahkewistahaw's claim to be entitled to validation and settlement under the terms of the Framework Agreement, Canada argued that the First Nation is not a party to the agreement and therefore is not entitled to claim any benefit from it.

Summary of Positions

Although evidence was tendered showing the paylist population, absentees, arrears, and "late additions" (such as new adherents to treaty and transfers from landless bands) premised on an 1880 base paylist, neither party adduced any paylist analysis of "late additions" to the 1881 paylist. Subject to this caveat, the positions of the parties may be summarized as follows:

	Kahkewistahaw (1880 base paylist)	**Canada** (1881 base paylist)
Base paylist	430	186
Absentees and arrears	22	70
Total minus "late additions"	**452**	**256**
Late additions	145	
Total	**597**	

When it is considered that Kahkewistahaw received enough land for 365 people, it is obvious that choosing one of these alternatives over the other spells the difference between a significant outstanding treaty land entitlement owed by Canada, if we adopt the First Nation's approach, and a finding that the Crown has completely

discharged its treaty obligations to provide land to Kahkewistahaw, if we prefer Canada's interpretation.

CONCLUSIONS

To determine whether the claim is valid, the Commission has had to consider the following issues:

1 What is the appropriate date for calculating Kahkewistahaw's treaty land entitlement?

2 What is Kahkewistahaw's population for treaty land entitlement purposes?

3 Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?

Our findings are stated briefly below.

Issue 1: Date for Calculating Treaty Land Entitlement

Based on the principles of treaty interpretation which have been developed in the courts and applied to land entitlement issues in previous inquiries before the Commission, we conclude that, as a general principle, a band's population on the date of first survey shall be used to calculate treaty land entitlement. Because it is important to develop and apply a consistent set of principles in relation to treaty land entitlement, we believe that we should not depart from the date of first survey as the standard except in unusual circumstances which would otherwise result in manifest unfairness.

The Commission sees nothing in the wording of Treaty 4 that would justify a different interpretation or approach to fixing the date on which Kahkewistahaw's treaty land entitlement should be calculated. A band's *entitlement* to reserve land arises upon the band signing or adhering to treaty, but the process of *quantifying* and *locating* the reserve is only triggered following a conference between the band and Canada's officers. However, it does not follow that the band's population on the date of selection should determine the size of the reserve. It is only when *agreement* or *consensus* is reached between the parties – by Canada agreeing to survey the land selected by the band, and by the band accepting that the survey has properly defined the desired reserve – that the land as surveyed can be said to constitute a reserve for the purposes of treaty, and that the parties can be said to have agreed to treat it as such. It is on this date that the band's population must be assessed to determined whether Canada has satisfied its treaty obligation to the band.

A completed survey verifies the precise *location* and *size* of a reserve, and is critical in measuring whether a band's treaty land entitlement has been fulfilled. A completed survey does not necessarily confirm, however, that the "first survey" of a band's reserve has occurred, particularly where the band rejects the lands as surveyed. The first survey can be identified by determining whether the reserve was surveyed or located in conformity with the treaty, and whether the survey or allotment was acceptable to Canada and to the band. The band's acceptance is demonstrated by its members actually living on and using the reserve. If the reserve boundaries have been adjusted, as in the present case, then, in the words of the Office of the Treaty Commissioner, "it must be determined whether the adjustment really constituted a new survey of a new reserve, or just a change in the boundaries of a reserve essentially in the same location."

The evidence in this inquiry indicates that Patrick and Johnson commenced but likely did not complete the survey of the Kahkewistahaw reserve in 1880. Even if that survey had been completed, the First Nation did not accept the suggested location of the reserve. Nelson's survey in 1881 added or substituted 20 to 25 square miles of land. When considered in light of the total area of 73 square miles surveyed for the First Nation by Nelson, the new area represented approximately one-third of the size of the reserve. This substantial "adjustment" in location was further enhanced by the nature of the additional land, which included frontage on the Qu'Appelle River, timber, and the land already being farmed.

We conclude, therefore, that the survey by Nelson was the true "first survey" for Kahkewistahaw. Canada's acceptance cannot be doubted, for the survey was eventually approved by Order in Council. Kahkewistahaw and his people accepted the reserve and have continued to live on and use it to the present day. The best evidence of the date of this first survey is the date on Nelson's survey plan: August 20, 1881.

Issue 2: Kahkewistahaw's Treaty Land Entitlement Population

The treaty paylist provides useful information regarding a band's population at date of first survey, but it is simply a *starting point* in determining the band's population for treaty land entitlement purposes. The paylist is an accounting of treaty annuities paid to individuals under a given chief, and not necessarily an accurate census of band *membership*. Paylist analysis is required to establish the band's *actual* membership – including band members who were absent at the date of first survey – and not simply the number of people who happened to be counted with the band in a given year. Since the base paylist is merely *prima facie* evidence which is

subject to rebuttal, all available evidence that tends to establish or disprove the membership of certain individuals in the band should be considered and weighed.

Kahkewistahaw argued that the appropriate "base paylist" to use as a starting point in treaty land entitlement calculations is the most recent paylist to which the surveyor would have had access in conducting his survey, or any other paylist on which it can be shown the surveyor actually relied. Regardless of whether the date of first survey was 1880 or 1881, Kahkewistahaw contended that the 1880 paylist was the appropriate "base paylist," since the First Nation maintained the date of selection was the proper date of entitlement and that date arguably preceded the payment of annuities to Kahkewistahaw on August 4, 1881.

The Commission has already stated its reasons for preferring the date of first survey to the date of selection. However, we also believe that the most reliable objective evidence of Kahkewistahaw's population as of the August 20, 1881, date of first survey – and thus the appropriate "base paylist" – was the August 4, 1881, paylist, subject to adjustments for absentees and "late additions," such as new adherents to treaty and transferees from landless bands.

Nelson may well have had access to this paylist when he completed his survey, but he likely relied on other information, such as earlier paylists, his discussions with the chief or Indian agent, and his own knowledge of the First Nation, in determining the size of the reserve. However, since the main question in this inquiry is whether Kahkewistahaw received sufficient treaty land, what Nelson actually *did* is less important than what Treaty 4 *obliged* him to do. In this case, his decision to survey enough land for 365 people actually worked to the benefit of the First Nation, since Treaty 4 only required him to provide land for 186, plus absentees and "late additions."

We do not agree with Kahkewistahaw that a "fair, large and liberal construction [of Treaty 4] in favour of the Indians" requires us adopt the First Nation's approach; the same approach may work to the detriment of another band in another case. A fair, large, and liberal interpretation should yield a consistent principle that can be applied in all cases, rather than yielding results that are consistent only because they are invariably to the benefit of First Nations.

Therefore, if the 1881 base paylist is used as the starting point, the evidence shows that Kahkewistahaw had a population of 186, together with 70 absentees and arrears, at the date of first survey. Since the paylist research was predicated on an 1880 date of first survey, we do not have any reliable figures on the number of "late additions" to add to this preliminary total of 256. For its claim to be validated, Kahkewistahaw must demonstrate that more than 109 new adherents or landless transfers have joined the First Nation since 1881. Unless such evidence is forthcoming, we conclude that Kahkewistahaw has not established an outstanding treaty land entitlement.

We do not believe that we should make an exception in this case to the general rule that the date of first survey shall be used to calculate treaty land entitlement. Such an exception is only to be made in unusual circumstances that might otherwise give rise to manifest unfairness. The evidence shows that Canada's officials conferred with Chief Kahkewistahaw and acted in good faith in setting aside a land base in accordance with treaty having river frontage, timber, and agricultural land for the First Nation's future needs.

Finally, since we have concluded that the 1881 paylist provides the best evidence of the First Nation's date-of-first-survey population, the question of whether certain individuals should be counted with Kahkewistahaw or Nekaneet has

been rendered largely academic. However, even if we had preferred the 1880 paylist, we may have had serious reservations about including individuals paid with Kahkewistahaw in 1880 but subsequently paid at Fort Walsh. With respect to those people who were paid only once with Kahkewistahaw, one must consider whether they had a sufficient connection or continuity of membership with the First Nation. All "connecting factors" must be taken into account, especially where there are competing equities for including a particular person as a member of one band or another. It must be remembered that those individuals who were not counted with Kahkewistahaw in 1881 were still eligible to be included in the First Nation's treaty land entitlement calculation as absentees or landless transfers, provided that they were not counted with another band for treaty land entitlement purposes before rejoining Kahkewistahaw.

Issue 3: Saskatchewan Framework Agreement

The only basis upon which a band can establish an outstanding treaty land entitlement claim is in accordance with the legal obligations that flow from treaty. Section 17.03 of the Framework Agreement does not provide Kahkewistahaw with an independent basis for validation of its treaty land entitlement claim. It merely provides non-Entitlement Bands whose claims are subsequently accepted for negotiation by Canada with the opportunity to settle their claims in accordance with the Framework Agreement's principles of settlement.

We find that Kahkewistahaw has not established an outstanding entitlement, and therefore section 17.03 creates no obligation upon Canada or Saskatchewan to enter into a settlement with Kahkewistahaw in accordance with the Framework Agreement. Moreover, the circumstances of Cowessess and Ochapowace are

distinguishable and do not afford Kahkewistahaw the basis for a claim to an outstanding treaty land entitlement. In any event, the real issue is not whether other cases have been decided differently, but whether Kahkewistahaw has a proper claim for outstanding treaty land entitlement under the terms of Treaty 4. We have concluded that it does not.

RECOMMENDATION

Having found that the Kahkewistahaw First Nation has failed to establish that the Government of Canada owes an outstanding lawful obligation to provide land to the First Nation under treaty, under the principles enunciated by the Commission in the Fort McKay, Kawacatoose and Lac La Ronge inquiries, or under the terms of the Saskatchewan Treaty Land Entitlement Framework Agreement, we therefore recommend to the parties:

> **That the claim of the Kahkewistahaw First Nation with respect to outstanding treaty land entitlement not be accepted for negotiation under Canada's Specific Claims Policy.**

PART I

INTRODUCTION

BACKGROUND

The inquiry that forms the subject matter of this report was convened at the request of the Kahkewistahaw First Nation.[1] The First Nation claims that Canada continues to owe it land under the terms of Treaty 4, whereas, in Canada's view, Kahkewistahaw has already received its full entitlement to treaty land. This inquiry requires the Indian Claims Commission (ICC) to clarify the process by which individuals entitled to be counted in establishing a band's treaty land entitlement are identified.[2]

Kahkewistahaw adhered to Treaty 4 on September 15, 1874. Under the terms of that treaty, Canada agreed to set aside reserves equal to one square mile (640 acres) for each family of five, or 128 acres for each member of the First Nation. The difficulty, however, is that the treaty does not state when or how a band's population should be counted for the purposes of calculating the amount of land to be set aside as reserve for its collective use and benefit.

Although a reserve of 41,414 acres was surveyed for the First Nation on the south side of Round Lake and the Qu'Appelle River in 1876 by William Wagner,

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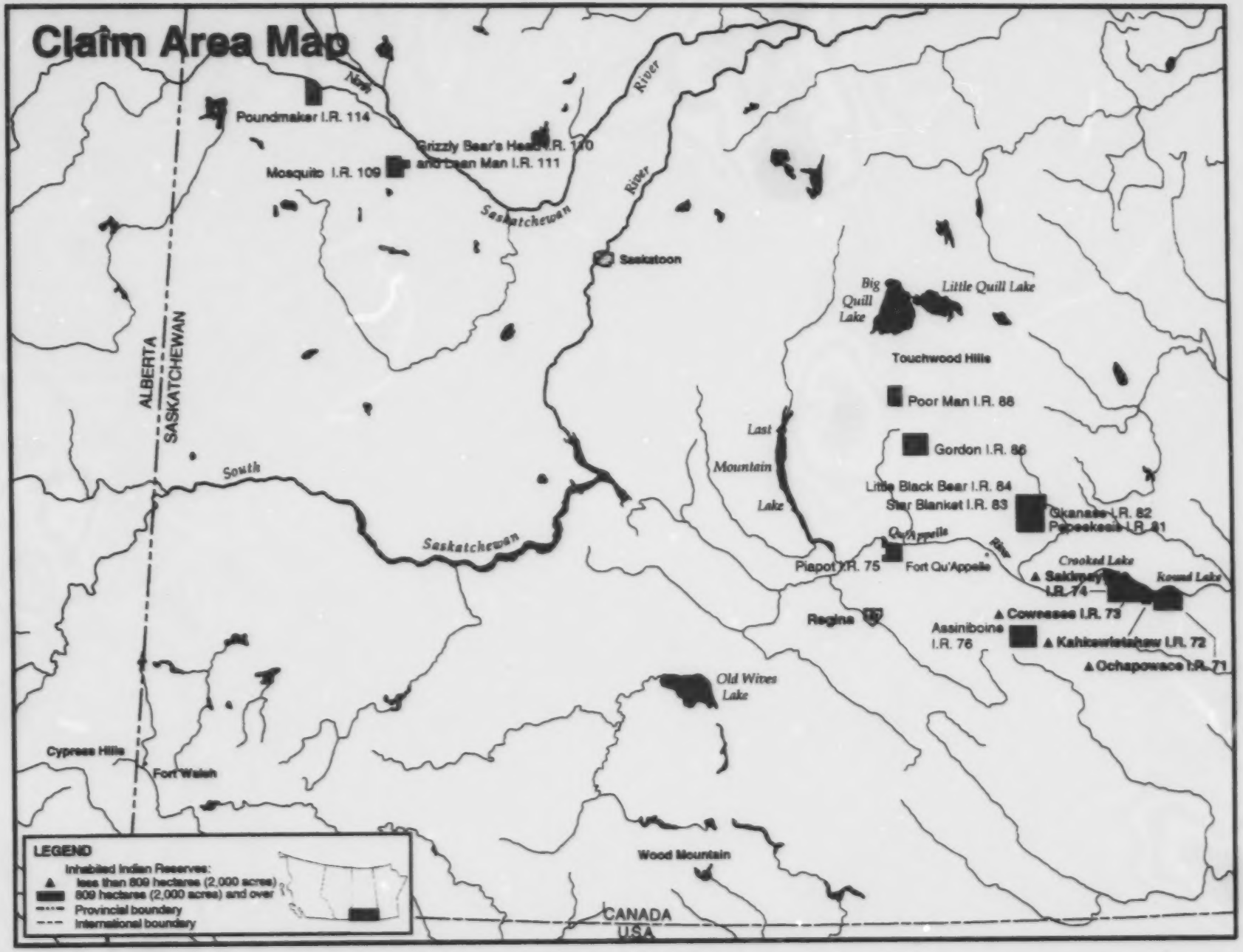
1 Alternatively referred to throughout this report as "Kahkewistahaw" or the "First Nation."

2 For background on the difficult subject of treaty land entitlement, see the three inquiry reports released by the Indian Claims Commission involving the Fort McKay First Nation, Kawacatoose First Nation, and Lac La Ronge Indian Band: Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), now reported at p. 3 of volume 5 of the *Indian Claims Commission Proceedings* (ICCP); Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), now reported at (1996) 5 ICCP 73; and Indian Claims Commission, *Lac La Ronge Indian Band Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), now reported at (1996) 5 ICCP 235.


Claim Area Map
Poundmaker I.R. 114
Mosquito I.R. 109
Grizzly Bear's Head I.R. 110
Saskatchewan
River
Saskatoon
ALBERTA
SASKATCHEWAN
South
Saskatchewan
Big Quill Lake
Little Quill Lake
Touchwood Hills
Poor Man I.R. 88
Last Mountain Lake
Gordon I.R. 86
Little Black Bear I.R. 84
Star Blanket I.R. 83
Okanese I.R. 82
Pasqua I.R. 81
Qu'Appelle River
Piapot I.R. 75
Fort Qu'Appelle
Crooked Lake
Round Lake
I.R. 74
Cowessess I.R. 73
Regina
Assiniboine I.R. 76
Kahkewistahaw I.R. 72
Ochapowace I.R. 71
Old Wives Lake
Cypress Hills
Fort Walsh
Wood Mountain
CANADA
USA
LEGEND
Inhabited Indian Reserves:
less than 809 hectares (2,000 acres)
809 hectares (2,000 acres) and over
Provincial boundary
International boundary

neither Canada nor the First Nation suggested that Kahkewistahaw's entitlement to treaty land should be measured with reference to that survey because Kahkewistahaw never settled on that particular parcel of land. In effect, that reserve was never accepted by the First Nation.

Another survey of land farther west and with no frontage on the Qu'Appelle River was undertaken in 1880 by Allan Poyntz Patrick and his assistant, William Johnson, but it is not clear whether this survey was completed. The following year, John C. Nelson surveyed and adjusted the reserve boundaries to include land being farmed by Kahkewistahaw band members, frontage on the Qu'Appelle River, and timber land. Nelson's work in 1881 resulted in the survey of Kahkewistahaw Indian Reserve (IR) 72, comprising an area of 73 square miles (46,720 acres) located roughly 130 kilometres east of Regina on the south shore of the Qu'Appelle River between Crooked Lake and Round Lake. IR 72 was adjoined on the east by the Ochapowace reserve (located on the site of the reserve surveyed for Kahkewistahaw by Wagner in 1876) and on the north and west by the Cowessess reserve.

Since IR 72 had only river frontage, Nelson also surveyed a small reserve on the north shore of Crooked Lake to provide access to a productive fishery. When this reserve was later found to be swampy, Nelson substituted an area of 96 acres on the north side of Crooked Lake in 1884 as a separate fishing station for Kahkewistahaw. This area became known as IR 72A.[3] Comprising a total of 46,816 acres, Indian Reserves 72 and 72A provided sufficient land for 365 people under the terms of Treaty 4, and were confirmed by Order in Council on May 17, 1889.[4]

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3 Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 7-8 (ICC Exhibit 6).

4 Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 40-45).

The central question in this inquiry is whether Kahkewistahaw's treaty land entitlement should be determined according to the population of the First Nation in 1880, when Patrick and Johnson commenced their survey work, or in 1881, when Nelson completed the survey that was approved by Order in Council.

The First Nation's claim to an outstanding treaty land entitlement was originally considered and rejected by the Department of Indian Affairs and Northern Development (DIAND) in the early 1980s. The issue resurfaced, however, during the negotiations that led to the execution of the Saskatchewan Treaty Land Entitlement Framework Agreement (the Framework Agreement) on September 22, 1992. The signatories to the Framework Agreement were the governments of Canada and Saskatchewan, and 26 Saskatchewan First Nations (the Entitlement Bands) whose treaty land entitlement (TLE) claims under Treaties 4, 6, or 10 had been "accepted for negotiation" or "validated" by Canada prior to the date of the Framework Agreement.[5] Kahkewistahaw was not included as an Entitlement Band, although, according to former Chief Louis Taypotat of the First Nation, it should have been:

> During the negotiations of the Framework Agreement, it became apparent that the Date of First Survey research done by the Department of Indian Affairs and Northern Development in the early 1980's was not properly performed. We were advised that we should do further research to confirm the results of the Date of First Survey research done for us. It quickly became evident that this research was not properly performed for our First Nation. We should have been

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[5] The 26 original Entitlement Bands were the Keeseekoose, Muskowekwan, Ochapowace, Okanese, Piapot, Star Blanket, Yellowquill, Beardy's & Okemasis, Flying Dust, Joseph Bighead, Little Pine, Moosomin, Mosquito Grizzly Bear's Head, Muskeg Lake, One Arrow, Onion Lake, Pelican Lake, Peter Ballantyne, Poundmaker, Red Pheasant, Saulteaux, Sweetgrass, Thunderchild, Witchekan Lake, Canoe Lake, and English River Bands.

> validated as a Treaty Land Entitlement Band. We therefore quickly prepared a claim which was submitted to your department for consideration. This was submitted to Al Gross [of DIAND] on May 20, 1992.[6]

The First Nation's submission of May 20, 1992,[7] claimed that Kahkewistahaw's 1880 treaty annuity paylist should be treated as the appropriate base paylist, and proposed a population of 597 (including absentees, transfers from landless bands, and new adherents to treaty) for treaty land entitlement purposes. As a result, the First Nation's claim was for a reserve allocation of 76,416 acres based on the Treaty 4 formula of 128 acres per person, meaning that the 46,816 acres actually received represented a shortfall of 29,600 acres. The circumstances of the Ochapowace First Nation were cited as comparable to those of Kahkewistahaw:

> The Ochapowace situation is similar to Kahkewistahaw's situation. The Ochapowace situation was fully canvassed with the Office of the Treaty Commissioner. Nelson's survey dealt with Ochapowace and Kahke-wistahaw at the same time and the annuity payments were paid at the same time – Ochapowace on August 3, 1881 and Kahkewistahaw's one day later on August 4, 1881. In the Ochapowace situation, the Office of the Treaty Commissioner accepted 1880 as the appropriate paylist. It is, therefore, submitted that Kahkewistahaw's

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6 Chief Louis Taypotat and Councillors, Kahkewistahaw Indian Nation, to Ron Irwin, Minister, DIAND, February 7, 1994 (ICC Documents, p. 332).

7 Kahkewistahaw Band Treaty Land Entitlement Claim Submission, prepared by Pillipow & Company, May 20, 1992 (ICC Documents, pp. 3-10); Kahkewistahaw Band Date of First Survey Treaty Paylist Analysis, prepared by Pillipow & Company, undated (ICC Documents, pp. 64-73).

> 1880 annuity paylist is also the most appropriate for the purpose of Kahkewistahaw's Treaty land entitlement.[8]

In later submissions, counsel for Kahkewistahaw also cited the circumstances of neighbouring Cowessess as analogous to those of Kahkewistahaw. Ochapowace was eventually included as an Entitlement Band under the Saskatchewan Framework Agreement, and counsel for Kahkewistahaw noted that both Ochapowace and Cowessess have since settled their outstanding treaty land entitlement claims.

On May 11, 1994, the Kahkewistahaw claim was rejected by Canada for the second time, on the following grounds:

> As you will recollect, the crux of the discussions was the appropriate Date of First Survey, i.e. 1880 or 1881. As a result of analysis, the federal view remains that the correct year for date of survey was 1881 rather than 1880. The fact that there was no plan of survey completed and available until 1881 distinguishes your claim from others with similar facts.
>
> On this basis, the evidence does not indicate that your First Nation has a TLE shortfall and the claim does not fall within our Specific Claims Policy. I would note, in addition, that while the 1880 date was rejected on grounds related to the availability of a survey plan, it would not have been an appropriate date in any event. The 1880 date would have included people whose descendants benefitted in 1992 from the Nekaneet TLE settlement agreement. The movement of people to Nekaneet is a necessary consideration.[9]

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8 Kahkewistahaw Band Treaty Land Entitlement Claim Submission, prepared by Pillipow & Company, May 20, 1992 (ICC Documents, pp. 8-9).

9 A.J. Gross, Director, Treaty Land Entitlement, DIAND, to Chief Louie Taypotat, Kahkewistahaw Indian Band, May 11, 1994 (ICC Documents, p. 2).

The 1881 paylist, which Canada asserts as the appropriate base paylist, includes only 186 individuals paid under Kahkewistahaw. When 70 absentees and arrears are added to the 186 on the paylist, the result is a total population of 256[10] – well below the figure of 365 people for whom land was surveyed by Nelson in 1881.

MANDATE OF THE INDIAN CLAIMS COMMISSION

Following the most recent rejection of the Kahkewistahaw claim, the First Nation requested that the Indian Claims Commission conduct an inquiry into the claim.[11] On August 31, 1994, the Commissioners agreed to conduct this inquiry.[12]

The Commission's authority to conduct inquiries under the *Inquiries Act* is mandated by Orders in Council which direct

> that our Commissioners on the basis of Canada's Specific Claims Policy . . . by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report upon:

---

10 Ian D. Gray, Counsel, DIAND Legal Services, Specific Claims West, to Kim Fullerton, Indian Claims Commission, June 26, 1995, with accompanying charts, showing (a) population as recorded by annuity paysheets, and (b) population including absentees and arrears (ICC Exhibit 15). These figures do not include transfers from landless bands or new adherents to treaty, and there is no evidence before the Commission on the numbers of these "late additions" to Kahkewistahaw's population as of 1881.

11 Kahkewistahaw Indian Nation Band Council Resolution KAHK-BCR-005-081, May 9, 1994 (ICC Documents, p. 1). The application and supporting documents were forwarded to the Commission on June 1, 1994: Stephen Pillipow, Pillipow & Company, to Indian Claims Commission, June 1, 1994.

12 Dan Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Chief and Council, Kahkewistahaw First Nation, September 2, 1994; Daniel Bellegarde and James Prentice, Co-Chairs, Indian Claims Commission, to Ron Irwin, Minister of Indian and Northern Affairs, and Allan Rock, Minister of Justice and Attorney General, September 2, 1994.

> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[13]

The Commission's mandate requires it to report on the validity of rejected claims "on the basis of Canada's Specific Claims Policy." That policy is set forth in a 1982 booklet published by DIAND entitled *Outstanding Business. A Native Claims Policy – Specific Claims*, which states:

> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown. . . .[14]

The purpose of this inquiry is to inquire into and report on whether, on the basis of the Specific Claims Policy, Canada owes an outstanding lawful obligation to the Kahkewistahaw First Nation to provide additional reserve land under the terms of

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[13] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[14] DIAND, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted in [1994] 1 ICCP 171-85 (hereinafter *Outstanding Business*).

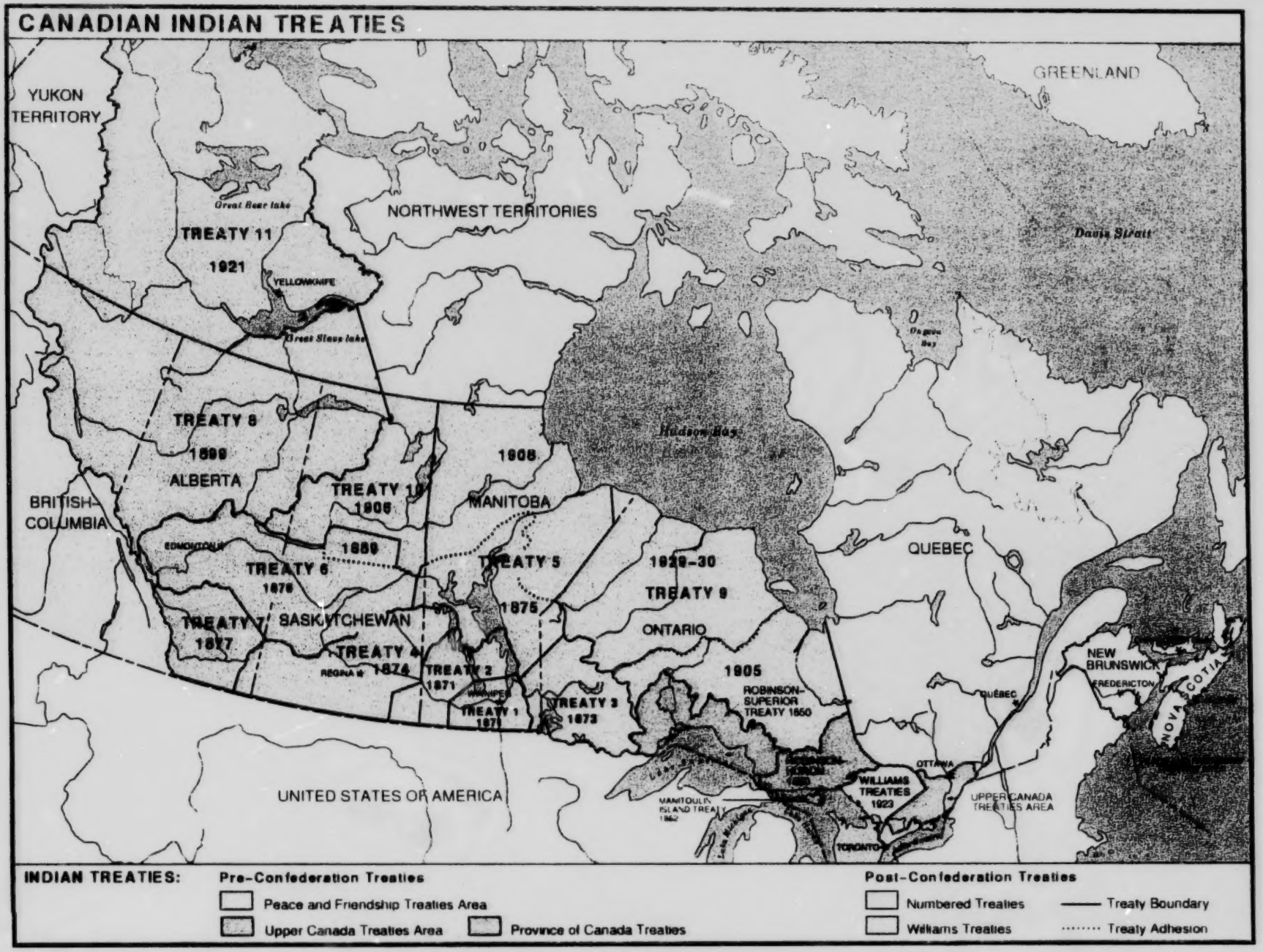
Treaty 4. In the Commission's view, this broad question must be addressed by considering the following three issues:

ISSUE 1 **What is the appropriate date for calculating Kahkewistahaw's treaty land entitlement?**

ISSUE 2 **What is Kahkewistahaw's population for treaty land entitlement purposes?**

ISSUE 3 **Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?**

We must first, however, consider the factual background to these issues.


CANADIAN INDIAN TREATIES
YUKON TERRITORY
GREENLAND
Great Bear lake
NORTHWEST TERRITORIES
TREATY 11
1921
YELLOWKNIFE
Great Slave lake
Davis Strait
Hudson Bay
TREATY 8
1899
ALBERTA
1908
BRITISH-COLUMBIA
TREATY 10
1906
MANITOBA
EDMONTON
1889
TREATY 6
1876
TREATY 5
1875
1929-30
TREATY 9
QUEBEC
TREATY 7
1877
SASKATCHEWAN
ONTARIO
TREATY 4
1874
REGINA
TREATY 2
1871
1905
ROBINSON-SUPERIOR TREATY 1850
NEW BRUNSWICK
FREDERICTON
QUEBEC
TREATY 3
1873
TREATY 1
1871
OTTAWA
WILLIAMS TREATIES 1923
UPPER CANADA TREATIES AREA
UNITED STATES OF AMERICA
MANITOULIN ISLAND TREATY
TORONTO
INDIAN TREATIES:
Pre-Confederation Treaties
Peace and Friendship Treaties Area
Upper Canada Treaties Area
Province of Canada Treaties
Post-Confederation Treaties
Numbered Treaties
Williams Treaties
Treaty Boundary
Treaty Adhesion

PART II

THE INQUIRY

The parties agreed that the issues before the Commission in this inquiry did not require a community session to hear evidence from the elders. Two joint sessions were conducted in Saskatoon, Saskatchewan, on May 24 and 25, 1995, with treaty land entitlement experts appearing on behalf of the Kawacatoose and Ocean Man First Nations in addition to Kahkewistahaw. The experts who testified were Kenneth Tyler, counsel with the Constitutional Law Branch of Manitoba's Department of Justice and a former advisor to the Federation of Saskatchewan Indian Nations (FSIN); Dr. Lloyd Barber, the chief negotiator for the FSIN on the Saskatchewan Framework Agreement; David Knoll, counsel for the FSIN in the negotiations on the Framework Agreement; James Gallo, the manager of Treaty Land Entitlement and Claims, Lands and Trusts Services, for DIAND, Manitoba Region, a former researcher on treaty land entitlement for the Manitoba Indian Brotherhood, and one of the architects of the Report of the Treaty Commissioner which preceded the Saskatchewan Framework Agreement; and James Kerby, counsel to Canada during the Saskatchewan Framework Agreement negotiations. The Commission also heard evidence from Peggy Martin-Brizinski and Jayme Benson of the Office of the Treaty Commissioner (OTC) with respect to two reports prepared by the OTC. In addition, the Commission has considered historical and documentary evidence entered as exhibits at the inquiry.

The parties each submitted written arguments to the Commission in February 1996, prior to making oral submissions at the final session in Saskatoon on February 22, 1996. The written submissions, documentary evidence, transcripts, and balance of the record of this inquiry are listed in Appendix A of this report.

HISTORICAL BACKGROUND

Treaty 4 (1874)

The background to the signing of Treaty 4 has been discussed in the Commission's recent report on the treaty land entitlement claim of the Kawacatoose First Nation. We adopt the following findings in relation to Treaty 4 from the Kawacatoose report:

> The early 1870s represent a period of great transition among the Indian nations that resided within the 75,000 square mile area of Treaty 4. The disappearance of the buffalo had been foreseen, white settlers were moving into the area, and some bands were taking steps to convert from the life of "plains buffalo hunters to reserve agriculturalists." Other bands were becoming more nomadic, moving freely back and forth across the U.S. border in pursuit of buffalo – a staple of the aboriginal diet and way of life. However, the increasing scarcity of buffalo led to periods of hardship and starvation, as well as greater competition and, ultimately, intertribal warfare over the remaining animals. As noted in the report prepared for this [Kawacatoose] inquiry by the OTC:
>
> > Conflict between Assiniboine, Blackfoot, Gros Ventre, Crow and Sioux was common in the nineteenth century as well as conflict between Indians and non-Indians. The white settlers were not sympathetic to the plight of the Indians and often ignored their rights. The Indian practice of horse stealing, which was common between tribes, angered whites. The illicit whisky trade in which traders sold whisky to the Indians in exchange for buffalo robes or other commodities further exacerbated the violence. The Cypress Hills massacre was an example of the type of violence that occurred in this period.
>
> Moreover, the survey operations of the Boundary Commission and the steps associated with erecting a proposed telegraph line west of Fort

Garry were starting to affect this territory, "all which proceedings are calculated to further unsettle and excite the Indian mind, already in a disturbed condition. . . ."

Alexander Morris was Lieutenant Governor of the area which then comprised Manitoba and the North-West Territories, including present-day Saskatchewan. Together with David Laird, the federal Minister of the Interior, and W.J. Christie, a retired factor with the Hudson's Bay Company, Morris was commissioned by the Government of Canada to make treaties with Indian nations in the southern "Fertile Belt."

At Lake Qu'Appelle in September 1874, the three Commissioners negotiated with the assembled Chiefs for six days to encourage the initially reluctant Indian leaders to accept the benefits of treaty in exchange for ceding Indian rights in the lands encompassed by Treaty 4. Morris reported the concerns expressed by the Chiefs at these meetings, particularly over what was perceived by the Indians to be the unfairly advantageous position of the Hudson's Bay Company at that time, but also over the rights of present and future generations of the aboriginal peoples. On September 11, 1874, the third day of the conference, Morris gave the Chiefs the following assurances:

> The Queen cares for you and for your children, and she cares for the children that are yet to be born. She would like to take you by the hand and do as I did for her at the Lake of the Woods last year. We promised them and we are ready to promise now to give five dollars to every man, woman and child, as long as the sun shines and water flows. We are ready to promise to give $1,000 every year, for twenty years, to buy powder and shot and twine, by the end of which time I hope you will have your little farms. If you will settle down we would lay off land for you, a square mile for every family of five. . . .

The next day Morris stated:

> The Queen has to think of what will come long after to-day. Therefore, the promises we have to make to you are

> not for to-day only but for to-morrow, not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the oceans. When you are ready to plant seed the Queen's men will lay off Reserves so as to give a square mile to every family of five persons. . . .

On September 15, 1874 – the final day of the conferences – the Commissioners convinced the Indians to sign Treaty 4, with Morris reported to have said:

> I know you are not all here. We never could get you all together, but you know what is good for you and for your children. When I met the Saulteaux last year we had not 4,000 there, but there were men like you who knew what was good for themselves, for their wives, for their children, and those not born. I gave to those who were there, and they took my hand and took what was in it, and I sent to those who were away, and I did for them just as I did for those who were present. It is the same to-day. What we are ready to give you will be given to those who are not here.

Thirteen Indian Chiefs, including Kawacatoose [and Kahkewistahaw], signed Treaty 4 that day. The key provisions of the treaty to be considered by the Indian Claims Commission are as follows:

> And whereas the Indians of the said tract, duly convened in Council as aforesaid, and being requested by Her Majesty's said Commissioners to name certain Chiefs and Headmen, who should be authorized on their behalf to conduct such negotiations and sign any treaty to be founded thereon, and to become responsible to Her Majesty for their faithful performance by their respective bands of such obligations as shall be assumed by them the said Indians, have thereupon named the following persons

for that purpose, that is to say: . . . Ka-wa-ca-toose, "The Poor Man" (Touchwood Hills and Qu'Appelle Lakes)[; Ka-kii-wis-ta-haw, or "Him that flies around" (towards the Cypress Hills)]. . . .

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians, and the same has been finally agreed upon and concluded as follows, that is to say:–

The Cree and Saulteaux Tribes of Indians, and all other the [sic] Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen, and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits. . . .

And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families. . . .

As soon as possible after the execution of this treaty Her Majesty shall cause a census to be taken of all the Indians inhabiting the tract hereinbefore described, and shall, next year, and annually afterwards for ever, cause to be paid in cash at some suitable season to be duly notified to the Indians, and at a place or places to be appointed for that purpose, within the territory ceded, each Chief twenty-five dollars; each Headman, not exceeding four to a band, fifteen dollars; and to every other Indian man, woman and child, five dollars per head; such payment to be made to the heads of families for

> those belonging thereto, unless for some special reason it be found objectionable.[15]

Like Kawacatoose, Kahkewistahaw (or "Him that flies around") was one of the 13 chiefs who signed Treaty 4 at Fort Qu'Appelle in 1874. Although Kahkewistahaw and the majority of his people eventually came to call the Qu'Appelle Valley their home, Treaty 4 gives the chief's place of origin as "towards the Cypress Hills."[16] The research panel from the Office of the Treaty Commissioner described Kahkewistahaw in these terms:

> Kahkewistahaw as chief came from a prominent family of Plains Cree leaders. His father had signed the Selkirk Treaty in 1817, and his brother was also a noted chief. Kahkewistahaw's band came from the east, and contained some Saulteaux people. There seems to have been an affiliation with Sakimay and with Cowessess. The band hunted in the Wood Mountain area as far west as the Cypress Hills, and came to Ft. Qu'Appelle every year for treaty payments. They evidently showed little interest in the fur trade or in agriculture, being primarily hunters.[17]

When the treaty was signed, Kahkewistahaw's Band numbered 65 members.

The key words of the treaty for the purposes of this inquiry are those found in the "reserve clause" highlighted in the foregoing excerpt from the Kawacatoose

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[15] Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), (1996) 5 ICCP 73 at 96-100. Footnote references omitted. Emphasis added.

[16] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 5 (ICC Exhibit 16).

[17] Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 1 (ICC Exhibit 2).

report. The important elements of this clause are the Crown's obligations to set aside a reserve comprising one square mile per family of five (or 128 acres per person) for each band, and to do so only after consulting with the band to ascertain its preferred location for the reserve.

As noted in the Kawacatoose report, the Indian Commissioners recognized when the treaty was signed that not all Indian bands were then prepared to convert from being "plains buffalo hunters to reserve agriculturalists." In addition to cash annuities, the treaty provided that bands would be furnished with supplies for hunting and trapping until they elected to take reserve land, at which time they would receive the implements necessary for an agrarian-based economy:

> Her Majesty also agrees that . . . yearly and every year She will cause to be distributed among the different bands included in the limits of this treaty powder, shot, ball and twine, in all to the value of seven hundred and fifty dollars. . . .
>
> It is further agreed between Her Majesty and the said Indians that the following articles shall be supplied to any band thereof who are now actually cultivating the soil, or who shall hereafter settle on their reserves and commence to break up the land, that is to say: two hoes, one spade, one scythe and one axe for every family actually so cultivating, and enough seed wheat, barley, oats and potatoes to plant such land as they have broken up; also one plough and two harrows for every ten families so cultivating as aforesaid, also to each Chief for the use of his band as aforesaid, one yoke of oxen, one bull, four cows, a chest of ordinary carpenter's tools, five hand saws, five augers, one cross-cut saw, one pit saw, the necessary files and one grindstone, all the aforesaid articles to be given, once for all, for the encouragement of the practice of agriculture among the Indians.[18]

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[18] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 7 (ICC Exhibit 16).

We noted in the Kawacatoose report that severe conditions faced the bands which adhered to Treaty 4 in 1874. Kenneth Tyler elaborated on these conditions with specific reference to the Kahkewistahaw First Nation:

> In 1874, Chief Kahkewistahaw signed Treaty 4 on behalf of his Band. It was already easy to see that times of great difficulty lay ahead. The great herd of buffalo were [sic] rapidly disappearing[. W]ithin six years they would practically disappear from the Canadian Prairies; and within twelve years they would be all but exterminated in the United States as well. As long as the buffalo had remained plentiful, the Plains Indians had prospered . . . proud and independent. When the buffalo departed they took this prosperity, and much else, with them. The members of the Kahkewistahaw Band had depended on the buffalo for survival. In the years following 1874, they were forced to depend upon the Canadian Government.[19]

Wagner's Survey (1876)

Following the execution of Treaty 4, Canada intended to proceed immediately with the establishment of reserves for those treaty Indians who desired them. In the summer of 1875, Surveyor General J.S. Dennis wrote:

> He [the Deputy Minister of the Department of the Interior] recommends that Mr. Wagner, D.L.S., be employed to survey the tracts set apart with which view that gentleman should immediately follow the Commissioner to Qu'Appelle and, upon the decision of the locality of the Reserve in that vicinity, he should survey the same and then follow the Commissioner . . . to the Touchwood Hills or such other point as the latter may have proceeded to, at which place, should the Commissioner require to go on previous to the Surveyor's arrival, he might leave instructions, in detail, respecting the precise locality and extent of the Reserve to be surveyed. . . .

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[19] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. i (ICC Exhibit 6).

> If the Minister approves, it might be suggested to the Commissioner that, *in setting apart any Reserves, the interests of the Indians should be considered* so far as to give them all the necessary frontage upon a river or lake, to include an abundance of land for farming purposes for the Band and at the same time, the tract should be made to run back and include a fair share also of land which may not be so desirable for farming but would be valuable for other purposes connected with the Band, such as hunting, etc.
>
> If practicable, he would say that the Reserves should be as nearly square as the localities selected may permit of their being made.[20]

Commissioner W.J. Christie met with the Indians of Treaty 4 in 1875 to pay annuities and to select reserves in accordance with the following instructions from the Minister:

> I. As regards the selection of the Reserves.
>
> *Each Reserve should be selected, as the Treaty requires, after conference with the Band of Indians interested, and should, of course, be of the area provided by the Treaty.*
>
> The Minister thinks that the Reserves should not be too numerous, so far as may be practicable, as many of the Chiefs of Bands speaking one language, as will consent, should be grouped together on one Reserve. . . .
>
> I am to add that Mr. Wagner, the gentleman named in the memorandum [of Surveyor General Dennis] will be instructed to place himself at your disposal for the purpose of proceeding with the surveys of the Reserves as selected in the manner recommended by the Surveyor General.[21]

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[20] Memorandum by J.S. Dennis, Surveyor General, July 13, 1875, National Archives of Canada [hereinafter NA], RG 10, vol. 3662, file 5007 (ICC Documents, pp. 161-62, 164-65). Emphasis added.

[21] David Laird to W.J. Christie, July 16, 1875, NA, RG 10, vol. 3622, file 5007 (ICC Documents, pp. 153-54). Emphasis added.

In their meetings with the Indians, Christie and surveyor William Wagner found that some bands were prepared to settle immediately and commence farming, while others such as the Kahkewistahaw First Nation preferred to continue their nomadic lifestyle:

> Reserves.
>
> The question of Reserves has been carefully considered and long interviews held with the Indians on the subject. Many of the bands have no desire to settle and commence farming, and will not turn their attention to agriculture until they are forced to do so on account of the failure of their present means of subsistence by the extermination of the Buffalo. Others have commenced to farm already, although to a very slight extent, and wish to have their Reserves set apart as soon as possible. . . .
>
> The following Bands have no desire to commence farming at present, and gave no intimation with regard to the localities where they desired their reserves to be set apart. (They are plains hunters and depend entirely on the buffalo for subsistence.)
>
> 1. Kakiwistahaw's (58 families). . . .[22]

Some 289 people followed Kahkewistahaw to Qu'Appelle to receive annuities in 1875, but Wagner did not survey a reserve for the First Nation that year.

In the fall of 1876, Wagner and Indian Agent Angus McKay met with the chiefs who had not yet obtained reserves for their bands. McKay reported on the land selections made for various bands, including Kahkewistahaw, that year:

> On the 5th [September] while the payment was going on, Mr. Wagner and I consulted with the Chiefs and headmen of the bands who had

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[22] W.J. Christie, Indian Commissioner, and M.G. Dickieson, to Minister of the Interior, October 7, 1875, NA, RG 10, vol. 3625, file 5489 (ICC Documents, pp. 173-76).

> been paid in regard to their reserves. At first we found them very unwilling to point out localities or to entertain the idea at all from a misunderstanding that once they accepted their reserves they would come under the subjection and control of the white man. I pointed out where they were in error and at last they agreed to locate their reserves. . . .
>
> I met several bands of Indians on the 7th, 8th and 9th and continued settling the reserves question during that time.
>
> I will now proceed to deal with the subject of Bands and their Reserves. . . .
>
> 9th. Chief Ka-ke-westa-haw, or "He who flies around"
>
> This Chief is a Cree Indian, the son of Sarina-Meh-chaihoo-kehew-ap or "He who sits with many Eagles," the famous "Austin's Guide" who was the chief of all the Cree tribe on the south side of the Saskatchewan and who was succeeded by the "Loud Voice."
>
> This chief possesses many of the good qualities of his father and is very well disposed towards the Canadian Government. His Band numbers 63 families of the Cree tribe who have never attempted to do any farming. *Their reserve is fronting on the south side of the Crooked Lake on Qu'Appelle River beginning opposite the eastern limit of "Loud Voice's" reserve and extending westward* and is very much the same as that of Star Blanket.[23]

The reserve surveyed by Wagner for Kahkewistahaw in 1876 contained 41,414 acres – enough land for 323 people, based on the Treaty 4 formula of 128 acres per person – and was situated on the site of the present reserve for the Ochapowace First Nation.[24] However, the evidence indicates that Kahkewistahaw

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[23] Angus McKay to Superintendent General, October 14, 1876, NA, RG 10, vol. 3642, file 7581 (ICC Documents, pp. 184-87). Emphasis added.

[24] ICC Transcript, May 25, 1995, p. 314 (Peggy Martin-Brizinski). It would appear that, in describing the reserve, Indian Agent McKay had confused Round Lake, on which Kahkewistahaw's 1876 reserve actually fronted, with Crooked Lake, which is also on the Qu'Appelle River but situated several miles to the west. Nevertheless, the eastern boundary of the reserve appeared exactly as described by McKay when Wagner later prepared

and his people never settled on the reserve surveyed for them by Wagner:

> That particular reserve does not appear to have been inhabited by the band, we don't have any definite evidence one way or the other but indirectly, it would appear that they were continuing to hunt, they were being paid, many of them being paid at Fort Walsh and were not settling on reserve.[25]

Teresa Homik states in her report entitled "Kahkewistahaw Reserve Date of First Survey" that documentation of Kahkewistahaw's reserves proved troublesome from the outset:

> According to records maintained by the Indian Lands Registry of the Department [of Indian Affairs and Northern Development], there is no record of any Order-in-Council confirming or establishing the reserve as surveyed by Wagner, nor is there any record of its surrender. There appears to be very little mention of it in the records of the Department. For example, during the years surrounding the above survey, it was the practice of Indian Affairs, then a branch of the Department of the Interior, to publish an annual schedule of Indian Reserves surveyed during the preceding year. Predictably, the schedule published in the Sessional Papers for the year ended October 31, 1876 does not mention Kahkewistahaw, as it was not surveyed until December of that year. Curiously, however, the schedule published in the following year, dealing with reserves surveyed during the year ended October 31,

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the survey plan. The plan shows the eastern boundary of the reserve extending south from Round Lake and immediately opposite the eastern boundary of the reserve for Kakishiway or "Loud Voice," which lay to the north of Round Lake: Natural Resources Canada, Canada Centre for Surveys and Mapping, Legal Surveys Division (Regina), "Indian Reserve Treaty No. 4, Ka-west-a-haw Band, River Qu'Appelle, surveyed during December, 1876 by William Wagner," CLSR Plan No. 969, Micro Plan 342 (ICC Documents, pp. 189, 308).

[25] ICC Transcript, May 25, 1995, p. 314 (Peggy Martin-Brizinski).

> 1877, does not mention any of the reserves surveyed by Wagner near Crooked Lake in late 1876, including Kahkewistahaw.[26]

In 1880, Surveyor General Lindsay Russell was asked to provide a list of all completed surveys, surveys under way, and reserves remaining to be surveyed.[27] The reserve surveyed by Wagner was identified as "Ka-west-a-haw Reserve 53."[28] Yet, it is not entirely clear why the reserve surveyed for Kahkewistahaw in 1876 was never settled on by the First Nation or considered to be Kahkewistahaw's reserve for the purposes of the treaty. Whatever the reasons, it is important to note that neither Canada nor the First Nation argued before this Commission that Wagner's survey should be considered Kahkewistahaw's "first survey" for treaty land entitlement purposes.

Survey Work by Patrick and Johnson (1880)

After Kahkewistahaw's adhesion to Treaty 4 in 1874, life for his people became increasingly arduous with the dwindling of the great herds of buffalo on which all plains hunters had relied:

> As for the majority of the Band who remained with Chief Kahkewistahaw, the years between 1875 and 1880 must have been very difficult. The buffalo were rapidly disappearing, and life on the

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[26] Teresa M. Homik, "Kahkewistahaw Reserve Date of First Survey," October 27, 1993 (ICC Documents, pp. 136-37).

[27] Unknown to Lindsay Russell, Surveyor General, May 19, 1880, NA, RG 10, vol. 3713, file 20694 (ICC Documents, p. 207).

[28] The reserve surveyed for Kahkewistahaw by Wagner was designated Indian Reserve 53 in "List of Indian Reserves," May 26, 1880, NA, RG 10, vol. 3713, file 20694 (ICC Documents, pp. 209, 310).

> Plains was becoming increasingly precarious. This situation was no doubt made worse by the flight of Sitting Bull with his large Band of Sioux into the Wood Mountain District in late 1876 and early 1877. This area seems to have been in the centre of Kahkewistahaw's traditional hunting area. Within a short time they had wiped out the remaining buffalo in the area, and from then until they left in 1881, the Sioux formed a barrier which prevented any buffalo from travelling from the United States past Wood Mountain to the Crees north of there. Although the Kahkewistahaw Band had not yet chosen a reserve site, we know from Indian Affairs Records that in the Spring of 1879, the Band accepted four bushels of seed potatoes, some garden seeds, an axe, a spade and two hoes from the Government. From this it is clear that Kahkewistahaw and his people were beginning to consider agriculture as an alternative to the pursuit of the vanishing buffalo.[29]

Teresa Homik stated that the acceptance of agricultural supplies by Kahkewistahaw members constituted "[i]ndirect confirmation of the settlement of at least some of the Band on land *of their own.*"[30] According to the OTC, the only land that the First Nation could arguably have called its own in 1879 would have been the 1876 reserve surveyed by Wagner,[31] but the OTC research panel disagreed that the First Nation's receipt of agricultural supplies necessarily implied settlement on that land:

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[29] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, pp. 2-3 (ICC Exhibit 6). See also Canada, Parliament, *Sessional Papers*, 1880, vol. 13, no.8, Paper no. 4, Annual Report of the Department of the Interior for the Year Ended 30th June 1879, p.110, "Return of Seed distributed to Indian Bands in the Spring of 1879" and "Return of Agricultural Implements distributed to Indian Bands in the Spring of 1879" (ICC Documents, p. 202).

[30] Teresa M. Homik, "Kahkewistahaw Reserve Date of First Survey," October 27, 1993 (ICC Documents, p. 137). Emphasis added.

[31] Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 4 (ICC Exhibit 2).

> In the report Kahkewistahaw Reserve: Date of First Survey, Teresa Homik argues that the distribution list of seed and agricultural implements for the North West Territories in 1879 gives indirect evidence that the band settled on their reserve by listing the "Ka-kee-wis-ta-haw" band as having received four bushels of seed potatoes, one axe, two hoes, and a spade. However, such a conclusion requires a great deal of conjecture. Agriculture implements and seed were supposed to be given to bands when they settled and commenced farming. If the members of the band had settled, it is possible that they had settled in an area other than the reserve area. The fact that the surveyor would later completely move the reserve suggests that the band had not permanently settled on the old reserve. Some band members may have been planning to settle in 1879 when they accepted the seed and implements, but never actually followed through on this activity until 1880, when Agent MacDonald [sic] persuaded them to go onto their new reserve. There are many possible scenarios to explain the distribution of seed and implements to the band and there was not enough strict monitoring of the distribution of these goods to use the fact that they received some of these items as proof that the band had settled on the 1876 reserve. What is clear was that a subsequent survey of a reserve for the Kahkewistahaw band moved the reserve to a new location.[32]

By the time treaty annuities were paid on July 18, 1880, living conditions for the Kahkewistahaw First Nation and other bands had become very difficult. Indian Agent McDonald was able to persuade several bands to take up reserves. McDonald's report of September 12, 1880, clearly demonstrates the critical state of the Indians and the need to move them to reserves:

> A good deal of distress existed last winter, at this place [Qu'Appelle] particularly, owing to the men going to the plains, and leaving their

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[32] Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 2 (ICC Exhibit 2).

women and children here; from those who could get work some return was got for the provisions supplied them. The fishing was not carried out as it might have been, on account of the severe winter [of 1879-80] and the slight clothing they had to protect themselves from the exposure on the lake. . . .

On my return from making the payments of annuities at the Cypress Hills, I found nearly all the Indians I had paid here, still camped about the Qu'Appelle lakes, and every few days calling at the office for relief. They were quite bewildered, not knowing what to do; to return to the plains was sure starvation, and every likelihood of the few horses they had being stolen from them.

I invited the chiefs and head men together, and explained the advantages they would derive by going on their reserves immediately; at the same time showed them the loss they would sustain every year by their not doing so. I also informed them that unless they went on their reserves I could not assist them in their work, nor could their old people be as well cared for.

I am happy to report that during the last week in August, and up to this date, I have succeeded in influencing eleven new bands, representing 2,310 souls, to go on their reserves. Four at the File Hills, which reserves are at present being surveyed by Mr. Patrick; four at the Crooked Lake, also being surveyed; one at Touchwood Hills; one here, and one at the Moose Mountains.

These Indians (Plain Crees) are totally ignorant of farming or the ordinary mode here of making a living, such as even making or setting a net, killing fish or small game, having always lived on the plains hunting the buffalo, and for the last seven years merely coming here for their annuities and presents. I have made provision for them on their reserves, and they are now being assisted in getting out logs and building houses for the winter.

These eleven bands, now having just gone on their reserves, have nothing to depend upon for a living, and until they produce something for themselves they must look for a liberal supply from a generous Government for support. Many of them have hardly enough to cover their persons, still they are willing to work and learn, and I

look forward to seeing these Indians in a few years doing a good deal towards their own support.[33]

Allan Poyntz Patrick and his assistant, William Johnson, had been assigned to the North-West Territories in 1880 to survey reserves for those Indian bands desiring them. Upon the arrival of the surveyors in Qu'Appelle, Indian Agent McDonald urged them to lay out reserves as quickly as possible for those bands he had persuaded to settle. At year end, Patrick reported:

> I have the honor to report to you on the result of the work which, during the past year, I have performed under your instructions. . . .
>
> *My work has embraced the survey of the following Indian reservations*:–
>
> 1st. Assiniboine, north of Cypress Hills, embracing 340 square miles.
> 2nd. O'Karree's Band, File Hills, embracing 20 square miles.
> 3rd. Star Blanket's Band, File Hills, embracing 20 square miles.
> 4th. Pepeiksis Band, File Hills, embracing 45 square miles.
> 5th. Little Black Bear's Band, File Hills, embracing 45 square miles.
> 6th. Osoup's Band, Crooked Lake; and
> 7th. *Rewistahaw's* [sic] *Band, Crooked Lake*. . . .
>
> Col. McDonald informed me that the Indian bands upon the "File Hill" and "Crooked Lake" reservations were making great complaints that their reserves had not been laid out; he requested me to lose no time in proceeding to define the limits of these reservations. In consequence of his urgent request, I divided my party, sending one in charge of my

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[33] A. McDonald, Indian Agent, Treaty No. 4, to Superintendent General of Indian Affairs, September 12, 1880, in Canada, *Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880*, 104-05 (ICC Documents, p. 344).

> assistant, Mr. Johnson, to "Crooked Lake," while I proceeded myself to the "File Hills." Mr. Johnson has not as yet made any report to me, but in a short conversation I had with him I learned that he left the Indians on this reservation well satisfied; he also informed me that the soil is good and timber plentiful.[34]

No survey plan or other record of Johnson's surveying efforts in 1880 has ever been located, and the boundaries he laid out are therefore uncertain. Indian Agent McDonald was the only other government official on location at the time, and his year-end report of January 3, 1881, added the following information:

> I have the honor to state that *the following Reserves are yet to be surveyed and completed* (viz.):
>
> | | | |
> |---|---|---|
> | Standing Buffalo (Sioux) | | Qu'Appelle |
> | The Ocean Man | } | |
> | Pheasant Reserves | } | Moose Mountains |
> | Yellow Quill | | Nut Lake |
> | Muscowaquans | | Touchwood Hills |
> | Loudvoice | } | |
> | [Osoups] | } | *Crooked Lake* |
> | *Kakewistahaw* | } | *to be completed* |
> | Chakachas | } | |
>
> . . . After this Little Child and Piapot will be the only two Chiefs who have not taken their Reserves.[35]

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[34] Report of Allan Poyntz Patrick, Dominion Topographical Surveyor, December 16, 1880, in Canada, Parliament, *Sessional Papers*, 1880-81, vol. 14, no. 8, Paper no. 14, Annual Report of the Department of Indian Affairs for the Year Ended 31st December, 1880 (ICC Documents, pp. 214, 216, 313, 315). Emphasis added. Canada and the First Nation agree that the reference to "Rewistahaw" is a misspelling of Kahkewistahaw as there was no other band in the area with a similar name.

[35] A. McDonald to E. Dewdney, Indian Commissioner, January 3, 1881, NA, RG 10, vol. 3713, file 20694 (ICC Documents, pp. 237, 318). Emphasis added.

Of the four reserves located at Crooked Lake noted in McDonald's report, the only completed survey plan by Patrick and Johnson on record is for O'Soup's reserve.[36] This is seemingly corroborated in a series of correspondence beginning with Patrick's telegram to Lawrence Vankoughnet, Deputy Superintendent General of Indian Affairs: "Have my plans and field notes arrived. Galt wants answer. A.P. Patrick."[37] Vankoughnet replied to Galt, the Assistant Indian Commissioner: "Answer June 13/81 to Mr. Galt. Mr. Patrick's plans and field notes not yet received. LVK"[38] Vankoughnet subsequently received Patrick's plans and field notes, and notified Galt:

> With reference to my telegram of the 13th Instant in which I stated that Mr. Patrick's Plans and Field Notes had not been received, I have now to inform you that on the 15th and 17th Inst. respectively three Plans of (1) Little Black Bear, Star Blanket, O'Karree's and Pe-pe-kis-sis Reserves at File Hills, (2) Osoup's Reserve on the Qu'Appelle River and (3) the Assiniboine Reserve, Treaty 4, were received at this Department without any covering letter. They were apparently mailed at Fort Assiniboine, Montana Territory, about the 8th Instant.
>
> I now send these documents to you inasmuch as they require to be examined and certified by Mr. Dewdney before they can be accepted by the Department as correct.[39]

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[36] Natural Resources Canada, Canada Centre for Surveys and Mapping, Legal Surveys Division (Regina), "Osoup's Reserve, Qu'Appelle River, (signed) A.P. Patrick, D.L.S.," CLSR Plan No. 204, Micro Plan 176 (ICC Documents, pp. 235, 329).

[37] A.P. Patrick to L. Vankoughnet, June 13, 1881, NA, RG 10, vol. 3751, file 29992 (ICC Documents, p. 345).

[38] L. Vankoughnet to E.T. Galt, June 13, 1881, NA, RG 10, vol. 3751, file 29992 (ICC Documents, p. 345).

[39] [L. Vankoughnet] to E.T. Galt, June 23, 1881, NA, RG 10, vol. 3751, file 29992 (ICC Documents, pp. 236, 346).

The delayed arrival of survey plans from Patrick was not surprising. Peggy Martin-Brizinski of the OTC testified that Patrick was criticized for his disorderly record keeping.[40] This was confirmed in later documents in which Patrick was refused consideration for additional work.[41] Nevertheless, based on Patrick's report of December 16, 1880, the OTC suggested that Patrick and Johnson had at least commenced some survey work in 1880 on Kahkewistahaw's behalf:

> Being a year end report of work completed, this document [Patrick's report] clearly indicates that work was done on the Kahkewistahaw reserve in that year. . . .
>
> Unfortunately, a plan for the survey of the Kahkewistahaw reserve cannot be located and possibly no longer exists; of all of the surveys which may have been carried out in Crooked Lakes, only the plan for O'Soup's reserve has been found. It was not unusual for records in that era to be lost or to have never been submitted. The Department of Indian Affairs records are full of references to documents that cannot now be located. It is also probable that the

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[40] ICC Transcript, May 25, 1995, p. 315 (Peggy Martin-Brizinski).

[41] Chas. H. Beddoe, Accountant's Branch, Department of the Interior, to A.M. Burgess, Deputy Minister of the Interior, August 17, 1885, NA, RG 88, vol. 296, file 0132 (ICC Documents, p. 121); Surveyor General, Technical Branch, to A.M. Burgess, Deputy Minister of the Interior, August 19, 1885, NA, RG 88, vol. 296, file 0132 (ICC Documents, p. 120). The Surveyor General wrote:

> In reference to the application of Mr. A.P. Patrick's for employment on the surveys, the undersigned begs to submit that the past record of Mr. Patrick as a surveyor is most unsatisfactory.
>
> In 1878 he was placed in charge of a survey of Indian Reserves and in 1880, the Hon. Mr. Dewdney found Mr. Patrick's accounts so mixed and irregular that he gave instructions for the work to be closed.
>
> The cost of the survey was about [illegible] and for this large amount, very little work was performed.

> survey was not completed, as noted above, although one can presume that some work was done.[42]

In its 1995 report, the OTC again stated that "Johnson's survey may have been incomplete."[43]

Kenneth Tyler expressed fewer doubts about the establishment of a reserve as a result of Johnson's 1880 survey work:

> Kahkewistahaw appears to have been one of those who was ready to settle, and, in August of 1880, he seems to have agreed to take a reserve near the Crooked Lakes. Surveyor Johnson was immediately dispatched to lay out a reserve for the Band. There had been 258 people paid with the Chief at Ft. Qu'Appelle the month previous, which would have entitled the Band to a reserve of almost 52 sq. miles. Johnson laid out more than 64 sq. miles of land for them, no doubt because he believed that some of the Indians under Manitoncan [sic] and Foremost Man[44] at the Cypress Hills would join Kahkewistahaw later. The location of this first reserve is not known for certain but it seems to have been about nine miles by seven, in the area that was later surrendered by the Band. It had no frontage on the Qu'Appelle River.[45]

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[42] Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 3 (ICC Exhibit 2).

[43] Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1985, p. 4 (ICC Exhibit 5).

[44] This reference is to Nekaneet who is also referred to in various sources as "Nikaneet" and "Necanete," or in English translations as "Foremost Man," "Front Man," and "Goes Before." The official designation currently in use by the Band is "Nekaneet Indian Band."

[45] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 4 (ICC Exhibit 6).

Tyler's report includes a sketch of the suggested location of the Kahkewistahaw reserve surveyed by Johnson, although Tyler noted on the sketch that "Johnson's survey plans have not been found, so this map is based upon conjecture."[46]

The OTC did not share Tyler's confidence in the sources on which he relied to define the size of the reserve:

> Using the 1881 survey as a guide, the location of the 1880 survey appears to have been immediately to the south of O'Soup's reserve. . . . Ken Tyler, in his undated unpublished report, "The Government of Canada and the Kahkewistahaw Band," argues that the reserve was located to the south of O'Soup's reserve and was approximately 9 miles wide and 7 miles deep. Although Tyler apparently took his information from a letter sent from A.F. Mackenzie to W. Graham, September 21, 1931 (DIA file 673/30-4-7, vol. 1), the contents of the letter do not confirm this measurement.[47]

Jayme Benson also provided a sketch of the proposed location of the reserve which the OTC concluded had been surveyed or commenced in 1880.[48] The sketch shows the 1880 Kahkewistahaw reserve located along the entire south boundary of O'Soup's reserve, with no "panhandle" for O'Soup along the west boundary of the Kahkewistahaw reserve as suggested by Tyler. Benson prepared an additional sketch comparing the proposed location of the 1880 reserve with Kahkewistahaw IR 72 set

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[46] Ken Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 5 (ICC Exhibit 6).

[47] Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 4 (ICC Exhibit 2). Unfortunately, the letter from A.F. Mackenzie to W. Graham referred to in this passage is not in evidence before the Commission.

[48] ICC Transcript, May 25, 1995, p. 319 (Jayme Benson). The sketch is located at ICC Documents, p. 328. Benson's sketch was based not on a survey plan but rather on the report by surveyor John C. Nelson, who, as discussed previously, performed the 1881 survey.

aside in 1881.[49] If Benson's second sketch is correct, it is clear that there was a substantial difference between the 1880 survey and the reserve which was ultimately set aside for the First Nation in 1881.

Nelson's Survey (1881)

Following Indian Agent McDonald's report of January 3, 1881, regarding reserves "yet to be surveyed and completed," Indian Commissioner Edgar Dewdney was asked on March 17, 1881, to outline the steps by which he proposed "to have the boundaries of these Reserves run during the ensuing season."[50] Dewdney replied that he intended to employ John C. Nelson,[51] who "has a good knowledge of the country and of the Indians, he having been for some years assisting Mr. Patrick who until lately was in our employ."[52]

When Nelson arrived at Crooked Lake, McDonald had laid much of the groundwork for establishing the reserves. McDonald gave the following account:

> I have the honor to submit the following Report of matters connected with Treaty No. 4 during the year ended 30th June, 1881. . . .
>
> There appeared at one time a little dissatisfaction and jealousy among the chiefs on the choice of the reserves at the Crooked and Round Lakes; I was able to effect an amicable understanding amongst them, and when Mr. Nelson, D.L.S., the gentleman instructed to

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[49] ICC Documents, p. 329.

[50] Unknown to E. Dewdney, Indian Commissioner, March 17, 1881, NA, RG 10, vol. 3713, file 20694 (ICC Documents, p. 238).

[51] E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, March 18, 1881, NA, RG 10, vol. 3713, file 20694 (ICC Documents, p. 239).

[52] E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, February 5, 1881, NA, RG 10, vol. 3733, file 26733 (ICC Documents, p. 240).

> locate the reserves, proceeded to work, he had no difficulty in satisfying each band as to their boundaries.
>
> I may here state that in 1877 these bands had been allotted reserves on the north side of the Qu'Appelle River; owing to the want of timber for building and fencing purposes, it was considered advisable to move them to the south side.
>
> *The area of each reserve has been allotted to each band in proportion to the paysheets of 1879, the year in which the largest number of Indians were paid their annuities.*[53]

Nelson's report for the year ended December 31, 1881, is a pivotal piece of evidence in this inquiry for two reasons. First, it sheds additional light on the extent of the efforts of Patrick and Johnson in the preceding year. Second, it also provides some understanding of the chronology of events of late July and early August 1881 when Indian Agent McDonald was distributing annuities to the Indians in the Qu'Appelle Valley and Nelson was doing his survey work:

> The season's work comprised the allottment [sic] of reserves in the following localities, viz. -
>
> Moose Mountain
> Crooked and Round Lakes
> Nut Lake
> Fishing Lake
> Touchwood Hills
> The Qu'Appelles. . . .
>
> On the 21st July the survey of the Moose Mountain reserves was completed, and a general stampede of the animals took place on the

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[53] A. McDonald, Indian Agent, to Superintendent General of Indian Affairs, January 19, 1882, in Canada, Parliament, *Sessional Papers*, 1882, vol. 15, no.5, Paper no. 6, Annual Report of the Department of Indian Affairs for the Year Ended 31st Decwember, 1881 (ICC Documents, p. 212). Emphasis added.

22nd, causing a delay of two days. I followed them up at once, accompanied by Red Ears *alias* the Beaver Potato, a good tracker, whose services I procured at the Indian camp, and succeeded in capturing them far out on the Plains of the Souris.

I left for Crooked Lake immediately after.

From the Head of the Mountain I struck northwards over a fine undulating fertile prairie with clumps of young poplar, for about forty miles, and entered the woods south of the Qu'Appelle Valley at Crooked Lakes.

The Indians there having desired a change in the position of the reserves already surveyed, I was instructed to survey suitable reserves on the south side of the valley for the Bands of Mosquito, O'Soup, Ka-Kee-wis-ta-haw, Ka-Kee-she-way and Cha-ca-chas, and to reduce the length of the frontage on the river, of the reserves already surveyed for them.

The old reserves occupied a frontage on the north side of the valley of thirty-one miles, and a frontage on the south side of twenty-one miles.

As I had no plans of the work done last year by Mr. Patrick I proceeded to make a reconnaissance of that part of the Qu'Appelle River likely to be made the front of the new reserves. I also examined the country thoroughly. After doing this I communicated with Colonel McDonald, Indian Agent, at Qu'Appelle, some of the Indian chiefs being there at the time.

After much planning as to the best manner of adjusting these reserves, it was decided to cut five miles off the lower part of O'Soup's reserve so as to give Ka-Kee-wistahaw a frontage on the river, and some of the bottom lands where they had already commenced farming, Ka-Keewistahaw's Band have now a good reserve, and a fair share of the timber in the gulches leading to the river.

It will be seen by referring to the map, sketch B, the Band of Ka-Kee-wistahaw have no fishing ground in front of their reserve like the others at Crooked and Round Lakes. I therefore thought it desirable

> to reserve for them a small bit of ground on the north side of Crooked Lake for a fishing station.[54]

Following the completion of the survey of the Moose Mountain reserves, Nelson needed two days to round up his animals following the stampede, and two more days to travel to the Qu'Appelle Valley. This means that he would not have been able to start his survey work on the Crooked Lake reserves until July 27, 1881.

The parties are in agreement that treaty annuities were paid to the Kahkewistahaw First Nation on August 4, 1881.[55] Ten days later, Nelson submitted the following interim report to the Assistant Indian Commissioner:

> I have surveyed the Reserves for the Ocean Man and Pheasant's Rump at the Moose Mountain and in a few days will have completed the Reservations on the south side of the Qu'Appelle at Crooked Lake and Round Lake for O'Soup, Ka-kee-wis-ta-haw, Ka-kee-shee-way and

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[54] John C. Nelson, Surveyor, Department of the Interior, to Edgar Dewdney, Superintendent General, Department of Indian Affairs, January 10, 1882, NA, RG 10, vol. 3573, file 154, pt. 2 (ICC Documents, pp. 35-38, 241-42, 319-20). According to evidence presented by the OTC, Nelson's comment about cutting "five miles off the lower part of O'Soup's reserve" is likely inaccurate. "The O'Soup survey plan shows a strip of 7199 acres on the east end of the map which has commonly been assumed to have belonged to O'Soup. Notations on the plan, however, indicate that this was a median strip between the boundary of O'Soup's 1880 reserve and Wagner's 1876 line – which was in fact the eastern border of the 1876 survey of Kahkewistahaw's reserve": see Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 3 (ICC Exhibit 2). Using the scale on the bottom of the O'Soup survey, it appears that the "median strip" comprised an east-west span of just over three miles, meaning that a length of slightly less than two miles was taken from O'Soup: A.P. Patrick, "Osoup's Reserve, Qu'Appelle River," Natural Resources Canada, Canada Centre for Surveys and Mapping, Legal Surveys Division, Plan 204, Micro Plan 176 (ICC Documents, pp. 235, 329).

[55] Submissions on Behalf of the Government of Canada, February 15, 1996, p. 1; Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, p. 59.

> Cha-cha-chas and Mosquito, a sketch of which will be sent you at an early date.[56]

Nelson completed his sketch showing the four Indian reserves on Crooked Lake and Round Lake – Mosquito, O'Soup, Kahkewistahaw, and Kakishiway/Chacachas – on August 20, 1881.[57] A more formal plan of the four reserves was also prepared, but is undated and unsigned.[58]

Several years later, after assuming a broader responsibility for Indian reserve surveys, Nelson approved the documents which were later confirmed by Order in Council in 1889 as the official plans of survey for IR 72 and IR 72A.[59]

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[56] Extract of letter from J.C. Nelson, DLS, to E.T. Galt, Assistant Indian Commissioner, August 14, 1881, NA, RG 10, vol. 3742, file 29200 (ICC Documents, p. 249).

[57] J.C. Nelson, "Sketch showing Indian Reserves on Crooked and Round Lakes," August 20, 1881 (ICC Documents, p. 247), which forms part of Nelson's year-end report for 1881 (John C. Nelson, Surveyor, Department of the Interior, to Edgar Dewdney, Superintendent General, Department of Indian Affairs, January 10, 1882, NA, RG 10, vol. 3573, file 154, pt. 2).

[58] Natural Resources Canada, Canada Centre for Surveys and Mapping, Legal Surveys Division, "Treaty No. 4, Indian Reserves on Qu'Appelle River and Round and Crooked Lakes, North West Territory, Season of 1881," CLSR Plan No. 230, Micro Plan 436 (ICC Documents, pp. 250, 324).

[59] Order in Council PC 1151, May 17, 1889 (ICC Documents, pp. 40-45, 123-30, 251-54). The final plans for Reserves 72 and 72A indicate that the surveys were conducted in August 1881, but the plans also indicate that they were approved by Nelson – who, by 1887, was in charge of Indian reserve surveys – on January 23, 1889. It is further apparent from Nelson's comments in a memorandum dated May 1, 1887, that these plans were prepared much later than August 1881: "It has long been felt desirable to collect in convenient form such information in regard to the extent and boundaries of the numerous Indian Reservations in the Province of Manitoba and the North-West Territories as might be necessary for the guidance of Indian Agents and other employees of this Department, or useful to the public, especially to settlers desirous of taking up lands in the vicinity of the reserves. In consequence *the following descriptions, and accompanying plans, have been prepared* by direction of the

Kahkewistahaw received a total allocation of 46,816 acres – sufficient land for 365 people under the Treaty 4 formula of 128 acres per person.

Population Trends and Migrations (1874-85)

The survey projects undertaken by Wagner in 1876, Patrick and Johnson in 1880, and Nelson in 1881 can only be understood within the context of the demographic changes occurring in the Kahkewistahaw First Nation and other bands in southern Saskatchewan at the time.

When Treaty 4 was signed and Wagner was surveying reserves in the area, many plains Indians were still earning their livelihood as buffalo hunters. As the buffalo became less plentiful, the Indian population was ravaged by starvation and disease. The OTC reviewed the plight of the Indians of that era:

> The history in this instance begins just after the signing of Treaty Four, when the buffalo trade had already been pushed west, and bands of Plains Cree, Saulteaux, and Assiniboine were in transition. . . . The membership of the bands in the North West Territories in the 1870s and the early 1880s was fluid as bands adapted to changing circumstances; a band which might have 200 members one year might double in size within a calendar year.
>
> Within this changing demographic environment, the treaty promises for reserve surveys were gradually being fulfilled in Treaty Four, beginning in 1875. There was no comprehensive census as promised in Treaty, but, rather, a gradual process of surveying reserves as the chiefs could be persuaded to settle upon them and begin farming. . . .

Honorable Edgar Dewdney, Indian Commissioner, *from the original records* of the Department, under the supervision of the undersigned." See memorandum by John C. Nelson, Department of Indian Affairs, May 1, 1887, NA, RG 2, 1642B, vol. 287 (ICC Documents, p. 123).

The conditions for survival of the Plains people were severe between 1876 and 1884. Most of the buffalo migrations into Canada from the U.S. were over, affected by mange, fires, and depletion through over-hunting for trade purposes. As a result, many people were moving into the Cypress Hills at the same time that reserves were being surveyed. The Cypress Hills offered access to the herds in the U.S., and the area between there and Wood Mountain to the east was the site of the last substantive buffalo migration into the Territories in 1881. The Cypress Hills was also recognized by the Assiniboine, Young Dogs, and some Cree as traditional territory, a winter haven with timber, game, and chinooks.

Fort Walsh, established in 1873, was a North West Mounted Police post which had an Indian agency and two Home Farms attached to it in 1879. These farms were sponsored by the Indian Department of the Department of the Interior. By the fall of 1879 the people who gathered at Fort Walsh for rations were starving, as NWMP police journals attest (see Journal of Colonel Irvine, NWMP, June 7, 1879: thousands of starving Indians present). In the spring of 1880 many left for the Milk and Missouri Rivers to hunt, returning in the late summer for annuities. The same pattern was repeated in 1881, and rations were once again offered. The largest number of Indians, 5000 or more, congregated at Fort Walsh in the summers of 1880-1881; rations and annuities were paid during these years to those who did not yet have reserves, but the government policy at the time was to encourage the Indians to become sedentary reserve dwellers who would make a living through farming. . . .

Angus McKay reported in 1876 that the seed had been given to the Indians at Qu'Appelle too late in the season to yield a harvest, and that provisions and employment building roads had to be provided to keep them from starving (McKay Oct. 14, 1876; PAC, RG10, vol. 3642, file 7581). Death from malnutrition, starvation, and disease was prevalent among the old and the young. Dysentery, smallpox, [and] measles were reported in 1880 (*Sessional Papers*, Annual Reports of the Commissioner of the NWMP 1880). In the summer of 1881 an epidemic of whooping cough took many children (*Sessional Papers*, Annual Reports of the Commissioner of the NWMP 1881).

The Indian Agents, the farming instructors, and the NWMP were working to keep the Indians from starving, while keeping rations at a bare minimum to discourage Indians from gathering at Walsh; the government urged them to move to reserves and begin farming. The Inspector of Indian Agencies, T.P. Wadsworth, wrote on August 29, 1881 that he was sure that the Indians were leaving their reserves to come to Walsh because they rejected the idea of having to work on their "reservations" for food, whereas they realized that they had only to show up at Walsh and the government would not let them starve (PAC, RG10, vol. 3744, file 29506-1). There was in fact insufficient work at Walsh for 5000 Indians to do; they were given some ammunition to hunt and fishing lines to take fish from the lakes, but otherwise there were far too many people for the government to fully realize its "work for rations" policy. Many had inadequate food and clothing to sustain prolonged physical endeavours. . . .

Many of the Indians gathered in the Cypress Hills wanted to continue the hunt as long as possible, and they realized the difficulties of farming. Given the precarious conditions, they chose to reduce the risks by going to where they might get rations. The Indians also argued repeatedly that the provision of agricultural assistance, ammunition, and rations were part of the treaty promises under Treaty Four (and Treaty Six). If they could not settle in the Hills permanently, as they hoped, they could at least expect government assistance for the period of transition and turmoil.

By late 1881 the government had tentatively decided to close Fort Walsh, and officials encouraged all bands to leave the area. The American government was guarding the border carefully, wary of the role of British Indians in horse thefts and in council with American relations. Only the lingering buffalo trade, and its spin off in the whiskey trade, provided a policy reason for keeping it open. By 1882 the government was actively moving people out of Walsh, cutting back rations to encourage them to go to reserves near Forts Battleford, Pitt, and Qu'Appelle. By 1883 they were refusing to pay annuities or issue rations, and bands which returned to Walsh were compelled to leave.[60]

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[60] Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, pp. 1-3 (ICC Exhibit

The OTC summarized the impacts of these conditions on the populations, livelihoods, and interrelationships of a number of bands in the Qu'Appelle Valley and the Cypress Hills - including Kahkewistahaw, Cowessess (Little Child), Kakisheway (Loud Voice) and Chacachas, Sakimay, Nekaneet (Foremost Man), and Piapot:

> There are some common points which can be made about all of the bands above:
> 1. The process of adhering to treaty and taking annuities was gradual over the first few years. Since most of the bands were nomadic, not everyone appeared each year in the place of payment. The decision to take annuity payments was a decision made by each family. As a result of the gradual adhesions, the populations recorded on the annuity lists began to peak around 1879.
> 2. With the exception of Sakimay, these bands did not begin settling on reserves until 1880-1881. . . . After Agent McDonald persuaded the other bands to settle on reserve in late summer 1880, at the time that Patrick was doing his surveys, they began to plan for seeding in the spring of 1881. Still, conditions were not right for many of them to stay on reserve.
> 3. Although it has not been included in the above descriptions to any extent, the government also realized that large numbers of people in destitute conditions could lead to an increase of other problems: horse raiding, theft, and even assaults on outsiders. They feared that the gathering of Indians and half-breeds might lead to riot or mass insurrection; they were aware that the police and agents were outnumbered even though the Indians were weakened by loss of horses (by raids from other groups), the confiscation of ammunition and supplies by American troops, and ill health. Indeed the Indians did call periodic councils to discuss what to do; Little Pine, Big Bear, and Piapot particularly exerted influence in these areas. They also realized the power of numbers:

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5).

> In the spring of 1881, Cree bands from all regions of the Canadian prairies left their reserves to go south to meet with Little Pine and Big Bear. Even the new bands Dewdney had created were going to the council in American territory. What was also disconcerting to Canadian officials were the reports that Big Bear and Little Pine, who had gone to Montana to prepare for the council, had reached an accommodations [sic] with the Blackfoot and had participated in a joint raid against the Crow (Tobias 1983: 529).

The council which Tobias described was not held because the American military began to force Canadian Indians to return over the border. Still, such plans kept people moving; the councils which did occur involved the fulfilment of treaty rights by the government and the unpredictability of government actions in implementing the terms of the bargains struck. In the spring of 1881, in the Battleford District, rumours that soldiers were coming to the area caused many people to go south, apparently, as did the hopes of participating in a buffalo hunt.

4. Because of the poor economic conditions, and the climate of uncertainty regarding government policy, some leaders were able to command large followings, taking members away from the other, smaller bands. The tremendous growth in Piapot's band membership in 1881 shows this; he attracted followers from bands both in the Qu'Appelle and Battleford districts, possibly through promises like the one Foremost Man reported. In 1881 the combined population of the Little Pine and Lucky Man bands rose to 1587 from 1139 in 1880, and only 795 in 1879. The populations of these bands dropped dramatically in 1883, after they left Fort Walsh; some of the members rejoined other bands.

The movement of people from one band to another, and from one place of payment to another, and from one hunting site to another was widespread during this period among those bands still in transition from a hunting and trading economy to a sedentary agricultural one. It was one of the responses which people made to the situation, as was the choice of whether indeed to take annuity payments. In 1881, before

> annuity payments were made, many people made the choice to leave their reserves for the hunt, and to hold council with their relatives. Some joined chiefs like Piapot and Little Pine who proposed that larger numbers of people, with annuities and supplies combined, could exert more influence both in the Territories and the U.S. Some probably perished from malnutrition or one of the diseases prevalent at the time. . . . [T]he population drops in 1881 were part of an immediate concentration of people from the nomadic bands in a few large groups, followed by dispersal and the gradual diminishing of populations as bands settled on reserve.[61]

Several historical documents presented to the Commission support the OTC's analysis. First, the treaty annuity paylists for the various Qu'Appelle Valley bands (except Sakimay) clearly show fluctuating population figures in the years following treaty. Initially the numbers grew as more Indians adhered to treaty and sought annuities. After cresting in 1879 and 1880, the populations dropped sharply in 1881 and 1882 as individuals pursuing the hunt or seeking greater security or bargaining power in negotiations with the government gravitated toward bands like Piapot and Nekaneet in the Cypress Hills. Finally, the numbers grew again after 1882 when the Indians were encouraged to leave the Cypress Hills to return to their reserves and take up agriculture. These population changes are summarized in Table 1.[62]

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[61] Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, pp. 12-13 (ICC Exhibit 5).

[62] There were several sources of population data in evidence before the Commission, including: Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, Appendix I (ICC Exhibit 5); Ian D. Gray, Counsel, DIAND Legal Services, Specific Claims West, to Kim Fullerton, Indian Claims Commission, June 26, 1995, attaching two population charts showing the population of the Kahkewistahaw First Nation (a) as recorded by the annuity paysheets, and (b) as recorded by the annuity paysheets, together with absentees and arrears (ICC Exhibit 15); Submissions on Behalf of the Kahkewistahaw First Nation, February 16,

Table 1
Population Trends, 1874-83

	1874	1875	1876	1877	1878	1879	1880	1881	1882	1883
KAHKEWISTAHAW										
- Fort Qu'Appelle			219	284	211	235	258	186		
- Fort Walsh			47			141	72			
- Maple Creek							88			
- Fort Ellice							12			
- Crooked Lake									160	274
Paylist Total	**65**	**289**	**266**	**284**	**211**	**376**	**430**	**186**	**160**	**274**
- Absentees			10	42	99	11	9	68	62	11
- Arrears		36	61	34	15	18	12	2	6	21
TOTAL		**325**	**337**	**360**	**325**	**405**	**451**	**256**	**228**	**306**
NEKANEET (Foremost Man)										
- Fort Walsh								**428**	**300**	
COWESSESS										
- Fort Qu'Appelle			50	104	79	95	96	68		
- Fort Walsh			168	307		405	30		182	
- Maple Creek							357	300		
- Fort Ellice										
- Crooked Lake									204	345
Paylist Total	**74**	**195**	**218**	**411**	**79**	**500**	**483**	**368**	**386**	**345**
- Arrears	51	75	124	127	125	61	50	70	43	35
TOTAL	**125**	**270**	**342**	**538**	**204**	**561**	533	**438**	**429**	**380**
OCHAPOWACE										
Kakisheway (Loud Voice)										
- Fort Qu'Appelle				187	244	154	235	152		
- Fort Walsh						149	69			
- Crooked Lake									245	314
Kakisheway Total			**207**	**187**	**244**	**303**	**304**	**152**	**245**	**314**
Chacachas										
- Fort Qu'Appelle			146	155	139	199	209	43		
- Fort Walsh			12				35			
- Crooked Lake										107
Chacachas Total			**158**	**155**	**139**	**199**	**244**	**43**		**107**
Paylist Total		**426**	**365**	**342**	**383**	**502**	**548**	**195**	**245**	**421**
Arrears		26	89	67	21	11	5	29	27	34
TOTAL		**452**	**454**	**409**	**404**	**513**	**553**	**224**	**272**	**455**
PIAPOT										
- Fort Qu'Appelle						331		11		
- Fort Walsh						20	201	1,400	894	
- Maple Creek							262			
- File Hills									47	
- Indian Head										587
TOTAL			**139**	**194**	**29**	**351**	**463**	**1,411**	**941**	**587**

It should be emphasized that the figures in Table 1 are reproduced here as evidence of trends only and should not be taken as this Commission's determination of the specific population for any given band in any particular year.

The numbers of individuals in these bands paid in locations *other than* Fort Walsh and Maple Creek (excluding absentees and arrears) rose to 1014 in 1879, dropped to 460 in 1881 and increased to 1627 in 1883. Similarly, the number of people paid with Kahkewistahaw at Fort Qu'Appelle and Fort Ellice grew to 430 or 431 in 1880, diminished to 186 in 1881 and 160 in 1882, and grew to 274 in 1883. At the same time, the number of individuals paid with all five bands in Fort Walsh and Maple Creek reached a maximum of 2128 in 1881 (when the numbers outside the Cypress Hills were at their lowest ebb), but dropped to none in 1883 when Canada decided to discourage Indians from residing at Fort Walsh by refusing to pay annuities or provide rations there. As Dewdney wrote in early 1882:

1996, Schedule I (Population of Kahkewistahaw, Ochapowace, and Cowessess based on paylist (without arrears)) and Schedule II (Population of Kahkewistahaw, Ochapowace, and Cowessess based on paylist (with arrears)); Submissions on Behalf of the Government of Canada, February 15, 1996, p. 4 (charts entitled "Kahkewistahaw Band Population: Base Paylist" and "Kahkewistahaw Band Population: Including Absentees"); "Cowessess Band Population 1874-1955" (table) (ICC Exhibit 21); "Ochapowace" (table) (ICC Exhibit 22). The shaded areas within Table 1 designate years in which significant discrepancies exist between the population figures or numbers of absentees or arrears in Appendix I of the OTC report (Exhibit 5) and the corresponding figures in Exhibit 15 (Kahkewistahaw), Exhibit 21 (Cowessess), and Exhibit 22 (Ochapowace). The table reflects the paylist populations from Appendix I of the OTC report since these figures are the only ones that show a breakdown of the locations where individuals were paid with the various Bands. The absentees and arrears have been obtained from Exhibits 15, 21, and 22 (although it should be noted that there is no evidence regarding absentees and arrears for Piapot and Nekaneet and no evidence regarding absentees for Cowessess and Ochapowace before the Commission). The totals, including absentees and arrears, are the sums of the foregoing figures, which, in most cases except the shaded areas on the table, correspond closely with the total figures in Exhibits 15, 21, and 22.

> I have thought it expedient to send Mr. Peter Erasmus to Fort Walsh to see the Indians in that neighbourhood and explain to them the necessity of their moving to their several reserves, as has been urged by you since your return from the East. I wish the Indians to understand that no payments will be made at Fort Walsh in the future, and it is expected that they will join their respective Chiefs and be paid with them. . . .
>
> It has been reported that Buffalo are coming north in considerable numbers. Should such be the case I fear it will be difficult to induce the hunters to come north and leave the plains, nor can we expect it.
>
> The Indians however should be informed that the responsibility of remaining out must rest with them, that no supplies will be kept at Fort Walsh and that when the hunt is over they will be expected to do as desired by the Government, viz. return to their several reserves.[63]

Dewdney's instructions to Erasmus were equally explicit:

> You are aware that the Government has been most anxious that the Indians south join their proper bands and return north. Your personal knowledge of the northern Indians will no doubt aid you in obtaining this end. You will take with you the pay-lists of 1879 which will assist your memory. Any families whom you may find have left their own proper Chiefs and joined others, you will inform that it is imperative before they receive any more annuity money, that they re-join their proper Chiefs. . . .
>
> In order that the Indians south may have sufficient time to return to their respective bands, I have decided to pay the annuity money some what later than heretofore, say about September next.[64]

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[63] E. Dewdney, Indian Commissioner, to Colonel Irvine, Commissioner, NWMP, May 30, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, pp. 361, 363).

[64] E. Dewdney, Indian Commissioner, to Peter Erasmus, Indian Department Special Service, May 30, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 364).

Another source which corroborates the evidence of the OTC regarding Kahkewistahaw's population changes is the 1881 year-end report by Dewdney to the Superintendent General of Indian Affairs. Dewdney detailed the efforts to encourage the Indians to settle on their reserves following the decimation of the buffalo north of the 49th parallel:

> I have the honour to submit my Report on Indian matters in the North-West Territories and Manitoba, for the year ending 1881. . . .
>
> I am glad to be able to state that during the last season, the efforts made by the Government to induce a greater number of the wild Indians to remain on their Reserves and work, has not been without success; while in certain districts, where active interest has been taken by the agents in charge, and where the chiefs have realized the advantages to be derived from tilling the soil, a very marked progress has been made.
>
> The surrender of "Sitting Bull" early in the summer; the visit of His Excellency the Governor General to the Territories; the return of a large number of our own Indians from the South, where most of them had been for nearly two (2) years; and the advent of the buffalo in large numbers, have rendered the past year an eventful one for the Indians. . . .
>
> At this time the report of buffalo coming north in large numbers was found to be correct, and it was thought advisable, under those circumstances, to pay the Indians their annuities and give them an opportunity of securing leather and sinews of both of which they were in great need. From that time to this a number of our Indians have been supporting themselves from the hunt, thus relieving the Government to some extent from the compulsory issue of large quantities of food supplies to the destitute, but it is very questionable whether the saving thus effected will in the end prove beneficial. I see no means by which we can prevent the Indians following buffalo if they come within easy reach as long as they have horses, guns and ammunition, neither do I think it would be advisable to force them to their reserves while there is a chance that they may make a living by hunting, as we are not in a position to set them all to work, and the

> result would be that we would be compelled to feed them and get nothing in return; in the meantime, land is being broken up on the reserves, and when the buffalo disappear and they are compelled to settle down, we will be in a better position to receive them. . . .
>
> We expect that large numbers of Indians who are now in the south but who belong to the reserves in the north, will return this year to their reservations in the western portion of Treaty 4, which includes Qu'Appelle, Crooked Lake, File Hills, Touchwood Hills and Quill Lake, and settle, and we will be compelled to keep a large staff of assistants to instruct them; but as on many of these reserves there are now numbers of Indian families who are comfortable, and who have taken to cultivating their ground, I anticipate no difficulty in inducing those who come in to work.[65]

Further support for the OTC's analysis is found in two letters which confirm the return of many of Kahkewistahaw's people to the reserve. The first was written by Indian Agent McDonald to Assistant Indian Commissioner E.T. Galt in June 1882:

> I have the honor to report that on my return of the 10th instant, I found the Indians under Mr. English from Ft. Walsh District had arrived the night previous. . . .
>
> They numbered, as far as I was able to arrive at:

Assiniboines, Long Lodge			97 souls
" The Man that took the coat			157 "
Cree Coweses (Little Child)		(Crooked Lake)	85 "
Ka-ki-wis-ta-haw		(Crooked Lake)	33 "
Pe-pe-ki-sis		(File Hills)	53 "
Stragglers, Touchwd. Hills Res.		(File Hills)	28 "
in all about			453

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[65] E. Dewdney, Indian Commissioner, to Superintendent General of Indian Affairs, January 1, 1882 (ICC Documents, pp. 348-49).

> Ka-ki-wis-ta-haw's party was picked up on their way in from Wood Mountain in a starving condition. They had but a few horses and one cart, and it was fortunate for them that they fell in with English's party.[66]

In the second letter, the Inspector Indian Agencies and Superintendent Indian Farms, J.P. Wadsworth, updated Dewdney on the progress which had been made by Kahkewistahaw by 1883:

> Early upon the morning of May 5th altho a snow storm prevailed the Indian Agent, the Farming Instructor (Mr. Setter) and myself first visited Ka-ka-wis-tahaw's reserve, a distance of 8 miles, this Band are farming in a magnificent gully between "Round" and "Crooked" Lakes, they were not at work on account of the arrival of their friends: in an interview with the Chief and his Headmen they asked for a schoolmaster, a resident farming instructor, and that the Doctor should visit them oftener, they also asked for more work oxen: *the Band only came from the Plains last year*, they have 16 dwellings and already had 12 acres wheat sown: the work had all been done by Indians and was well performed.[67]

Regarding the return of Kahkewistahaw members to the Qu'Appelle Valley in 1882 and 1883, Kenneth Tyler observed:

> A few families from the Band had settled on the Reserve in 1880, but most did not abandon life on the Plains until 1882. In 1883, several more Band members came in from Cypress Hills. Although Foremost

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[66] A. McDonald, Indian Agent, to E.T. Galt, Assistant Indian Commissioner, June 20, 1882, NA, RG 10, vol. 3744, file 29506-2 (ICC Documents, p. 367).

[67] J.P. Wadsworth, Inspector Indian Agencies and Superintendent Indian Farms, to E. Dewdney, Indian Commissioner, May 30, 1883, NA, RG 10, vol. 3640, file 7452, pt. 1 (ICC Documents, pp. 376-77). Emphasis added.

> Man's Band was expected to settle with Kahkewistahaw's people, this was not to be. The majority of that Band stubbornly resisted Government pressure and remained near the Cypress Hills.[68]

Peggy Martin-Brizinski of the OTC testified on the same point:

> By late 1881 there is a tentative decision to close Fort Walsh. The reason for that is a couple of things, one of them was they felt that if they closed the fort that they would force people to leave that area and to go back to the reserves in the Qu'Appelle and Battleford Districts. The other reason was pressure from the American government because Fort Walsh was so close to the border it was sort of a jumping off point to get down to the Milk River area, and the American military was actively intervening to discourage the British Indians from coming down below the border.
>
> So pressure from the American government was one of the factors which led them to consider closing that. They also had a very active buffalo-whisky trade which they were quite concerned about as well, flourishing in that area. So they wanted to get people out of that area, and they were also depleting the game and fish resources there too, they were having great difficulty keeping people alive.
>
> So in 1882 they begin to force people to move out of that region and in 1882 the majority of the bands leave in the spring and many of them are back by the fall, not yet in the position to be able to farm and being lured by the possibility of buffalo in that area, the hope that they were going to come back, and the promise of rations.
>
> In 1883 another push to [move] the people out and the majority of people go to their reserves and stay after 1883. So you see a lot of people, the populations are – or the issue of new adherents – or sorry, landless transfers – in a lot of the band research it becomes quite prominent around '83 and '84, you see people going back onto reserves and adding to the population there.

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[68] Kenneth Tyler, "The Government of Canada and Kahkewistahaw Band," undated, p. 14 (ICC Exhibit 6).

> So there is a lot of pressure to keep people out of that particular region and they close down Fort Walsh and quit paying annuities or rations out of that post. The only bands that remain down there is [sic] Nikaneet and Foremost Man. . . .[69]

In summary, the decline in the numbers of buffalo contributed to the lack of food, the prevalence of disease, and the discord among Indian people as to whether they should choose the traditional hunting pursuits or a sedentary agricultural lifestyle on the reserve. These factors, in turn, led to high levels of migration between bands from the signing of Treaty 4 in 1874 until the closing of Fort Walsh in 1883. In 1881 and 1882, in particular, this pattern of migration resulted in record populations at Fort Walsh and significantly reduced populations in the Qu'Appelle Valley, as many people apparently decided at that time to leave their reserves to pursue a traditional way of life. In 1883 and following years, after the government stopped paying annuities or providing rations at Fort Walsh, many people clearly rejoined Kahkewistahaw and other bands on their reserves, but it appears that some people remained in the Cypress Hills and were eventually recognized as a separate band under Nekaneet. It is against this turbulent backdrop that we must determine whether Canada satisfied its obligation to survey a reserve for the Kahkewistahaw First Nation under Treaty 4.

Nekaneet

The references by Kenneth Tyler and the OTC to Nekaneet are significant in this inquiry because Canada submitted that many of the individuals included in Kahkewistahaw's claim "received a significant treaty land entitlement settlement"

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[69] ICC Transcript, May 25, 1995, pp. 333-35 (Peggy Martin-Brizinski).

with Nekaneet in 1992 and should not be included in Kahkewistahaw's population count.

According to the OTC research panel:

> Foremost Man, or Nekaneet, or Front Man was the leader of a band which [was] paid separately for only two years, 1881 and 1882. Necanete, or Goes Before, was paid with Kahkewistahaw in 1875, and in 1876 seems to have been the head of a group paid at Fort Walsh. He was not with the band at Qu'Appelle in 1877 or 1878, but he appeared again with the band at Fort Walsh in 1879 and in 1880. In 1881 he headed his own band of 428 people at Fort Walsh; this diminished to 300 in 1882. Some of the Flying Round faction who were paid separately from Kahkewistahaw in 1880 under the Headman Manitoucan joined [Nekaneet] in 1881, as did people from other bands such as Piapot, Cowessess, Little Black Bear, Kakisheway, and Peepeekesis (Sparrow Hawk).
>
> The band was denied annuity payments after 1882 because they refused, in the spring of 1882, to leave Fort Walsh and take a reserve elsewhere. . . .
>
> The band remained in the Cypress Hills, and [because annuity payments were denied after 1882] its composition over the years can only be derived from oral history. The government believed that most of the members were stragglers from other bands, and that they should return to their own reserves for payment. It does appear from genealogy done with band members that people did join Foremost Man from the U.S., from Piapot, from some of the Qu'Appelle bands, and from Mosquito and Red Pheasant bands in the Battleford District.[70]

The OTC also made the following observations in its 1994 report:

> Kahkewistahaw shows a similar pattern of movement. The population in 1879 was 339, and up to 430 in 1880. In 1881 it is only 186,

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[70] Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, p. 9 (ICC Exhibit 5).

> insufficient for a survey of land for 365 people. Nelson would not have been surveying for a population as recorded in the paylists for that year; again, he would have known that many people had left in that year. *We know that some went to Foremost Man*, and others probably were among the large group of stragglers at Fort Walsh and Maple Creek that year. *The split away of Foremost Man probably accounts for the failure of the population to return to the pre-1881 size*, but this permanent loss could not have been predicted by the surveyor.[71]

Kenneth Tyler testified that "there were a substantial number of people in the Nikaneet Band that had been associated with the Kahkewistahaw Band"; he also noted that Nekaneet's following was derived from "a large number of . . . bands" and arose out of the "general distress and turmoil" which accompanied the disappearance of the buffalo.[72]

Historical correspondence shows that Canada for many years viewed Nekaneet's followers as stragglers from other bands and refused to recognize Nekaneet himself as anything more than a headman:

> I have the honor to report that the Indians now encamped in the Cypress Hills and along the Railroad in that vicinity lately sent one Joseph Tanner, an intelligent and well to do Indian, to interview me with the intention of endeavoring to obtain permission to select a Reserve adjacent to Maple Creek. Among the reasons advanced by them were that it was their country where they had long resided and they had through their representative "Frontman" been promised land in the neighborhood some years ago by a Departmental Official.
>
> In replying I stated that their request could not be granted on the following ground:

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[71] Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 6 (ICC Exhibit 2).

[72] ICC Transcript, May 24, 1995, pp. 80-81 (Kenneth Tyler).

> . . .
> 3. That the Indians petitioning have no right to show why they should be granted a Reserve either at Cypress or any other point as they are not members of any one Band but stragglers from a number of Bands. Besides which Foremost Man is not a Chief and had never been paid as such.
> 4. That nearly all, if not all his followers have been claimed by other Chiefs as belonging to them. . . .
> 6. That many of the petitioners have already been allotted lands in Reserves already surveyed on which are settled the bands to which they at one time claimed allegiance and of course cannot receive land a second time in another part of the country.
> 7. That many of these Indians have been paid with their bands and even last payment a number now petitioning were paid in the Qu'Appelle district and such a changing about cannot be authorized, otherwise endless trouble and confusion would ensue.[73]

The importance of the Nekaneet "connection" relates to the final population count for the Kahkewistahaw First Nation for treaty land entitlement purposes, and raises certain questions about which First Nation - Kahkewistahaw or Nekaneet - should be entitled to claim particular individuals as members for the purpose of quantifying treaty land entitlement. Ultimately, the issue of which, if any, members of Nekaneet are to be included or excluded for the purposes of calculating Kahkewistahaw's treaty land entitlement must be addressed. Before we can consider that issue, however, we must establish whether Kahkewistahaw has a valid claim, first, by determining the date on which its treaty land entitlement is to be calculated, and, second, by identifying the base paylist that should be used in making that calculation.

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[73] E. Dewdney, Commissioner of Indian Affairs, to Superintendent General of Indian Affairs, December 20, 1884, pp. 1-3 (ICC Exhibit 29).

PART III

ISSUES

Although Canada and Kahkewistahaw did not prepare an agreed statement of issues for this inquiry, the concerns identified by them are strikingly similar. The main dispute is whether Canada set aside enough reserve land for Kahkewistahaw under the terms of Treaty 4. In the Commission's view, however, to address this claim properly, we must answer the following three questions:

ISSUE 1 **What is the appropriate date for calculating Kahkewistahaw's treaty land entitlement?**

ISSUE 2 **What is Kahkewistahaw's population for treaty land entitlement purposes?**

ISSUE 3 **Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?**

Kahkewistahaw's position on these issues is that the appropriate date for calculating treaty land entitlement was 1880 and, therefore, the 1880 treaty annuity paylist ought to be used to determine the First Nation's population for entitlement purposes. Kahkewistahaw also submitted that, even if the Commission should conclude that 1881 was the First Nation's entitlement date, the 1880 paylist should nevertheless be used as the "base paylist" to determine the entitlement population. According to the First Nation's treaty annuity paylist analysis, the entitlement population (not including "late additions," such as new adherents to treaty and

transfers from landless bands) was 452. Since Canada set aside enough land for only 365 people, Kahkewistahaw asserted in its submissions to the Commission that there is an outstanding shortfall of land in the amount of 11,040 acres.[74] However, although it acknowledged that the question of "late additions" was being dealt with in the Fort McKay and Kawacatoose inquiries, the First Nation also noted that it does not accept Canada's position that "late additions" are not to be counted for treaty land entitlement purposes. Therefore, in its earlier request to Canada to have its claim accepted for negotiation, Kahkewistahaw also sought treaty land for 145 "late additions," which led to a cumulative entitlement population of 597 and an overall shortfall of 29,600 acres.[75]

Canada, on the other hand, asserted that the appropriate date for calculating Kahkewistahaw's treaty land entitlement was the August 20, 1881, date on the survey plan for IR 72. Further, Canada took the view that "the August 4, 1881 paylist (which lists 186 individuals) provides the best evidence of the Band's population at the Date of First Survey (DOFS)."[76] According to Canada's analysis, the First Nation received a substantial surplus of land because the population at date of first survey was only 186, but Canada set aside sufficient land for 365 people.

The Commission's tasks in this report, then, are, first, to identify a sound legal and policy approach to these questions and, second, to apply that approach to

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74 Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, p. 78.

75 Kahkewistahaw Band Treaty Land Entitlement Claim Submission, prepared by Pillipow & Company, May 20, 1992 (ICC Documents, pp. 3-10), together with Kahkewistahaw Band Date of First Survey Treaty Paylist Analysis, prepared by Pillipow & Company, undated (ICC Documents, pp. 64-73).

76 Submissions on Behalf of the Government of Canada, February 15, 1996, p. 1.

the unique facts and circumstances that surround the survey of the Kahkewistahaw reserves.

By admission of the parties, the third issue in this inquiry is identical to an issue which was recently argued before us by the same counsel in the treaty land entitlement claim of the Kawacatoose First Nation. We note that it was after the oral submissions were heard by the Commission in this inquiry that the Commission released its report on the Kawacatoose inquiry.[77] The parties did not have an opportunity to review that report in making their submissions in this case, but agreed to rely on the submissions made by the parties in the Kawacatoose inquiry in addressing this issue.

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[77] Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996).

PART IV

ANALYSIS

ISSUE 1: DATE FOR CALCULATING TREATY LAND ENTITLEMENT

What is the appropriate date for calculating Kahkewistahaw's treaty land entitlement?

The essential question in this inquiry is whether Canada satisfied its obligations under Treaty 4 by setting aside sufficient reserve land for the Kahkewistahaw First Nation. The reserve clause in Treaty 4 describes the process for establishing Indian reserves and the nature of the Crown's obligation:

> And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians, and to be of sufficient area to allow one square mile for each family of five, or in that proportion for larger or smaller families. . . .[78]

The wording of this clause confirms that a band's reserve was to be set aside by delegated representatives of the federal government after consulting the band on the preferred location of its reserve. Although the process is described, the treaty does not state clearly the date on which the band's population should be counted to determine the size of the reserve. It is therefore necessary to consider certain well-defined principles of law relating to the interpretation of Indian treaties, and to apply those fundamental concepts to treaty land entitlement and to the particular

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[78] *Treaty No. 4 between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice* (Ottawa: Queen's Printer, 1966), 6 (ICC Exhibit 16).

circumstances of this case, to determine whether Canada has set aside sufficient land for Kahkewistahaw under Treaty 4. The Commission employed this same method in the Fort McKay, Kawacatoose, and Lac La Ronge inquiries.

The difficulty in determining Kahkewistahaw's treaty land entitlement arises from the unique facts of this case. Not only is there considerable uncertainty over the date of first survey for the First Nation, but Kahkewistahaw's population fluctuated wildly during the critical time when IR 72 was surveyed. Kahkewistahaw argued that the date as of which entitlement should be calculated is 1880, when the paylist population of the First Nation was 430, based on the First Nation's paylist research. Canada contended that Kahkewistahaw's entitlement date was 1881 – when the paylist population plummeted to 186 – because the survey of IR 72 was commenced in 1880 but not completed until the following year. Since Kahkewistahaw received a reserve allocation sufficient for 365 people in the 1881 survey, choosing one date over the other will result in either a significant outstanding treaty land entitlement owed by Canada or a finding that the Crown has completely discharged its treaty obligations to provide land to the Kahkewistahaw First Nation.

Principles of Treaty Land Entitlement

At the outset the Commission must consider whether the population of a band on the date of first survey or the date of selection of reserve land should be used to calculate its treaty land entitlement. It should be noted that the Kahkewistahaw First Nation assumed for the purposes of the present inquiry that the date-of-first-survey *approach* is the appropriate method of calculating treaty land entitlement. Nevertheless, Kahkewistahaw also questioned the fundamental premise of the date-

of-first-survey approach by asserting that the date of selection rather than the date of survey is the more appropriate point *within the survey process* for determining entitlement. Counsel argued that this is the logical conclusion when the terms of Treaty 4 are interpreted in light of the surrounding historical context and the six established principles enunciated by the courts on the interpretation of Indian treaties. These principles have been concisely restated in the Office of the Treaty Commissioner's *Report and Recommendations on Treaty Land Entitlement*:

1. The treaty should be given a fair, large and liberal construction in favour of the Indians.

2. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians.

3. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned.

4. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible.

5. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.

6. The treaty was made with Indians not bands, and an examination of the treaty as a whole indicates that most terms are intended to treat individual Indians equally, and bands in proportion to their populations.[79]

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[79] Cliff Wright, Treaty Commissioner, *Report and Recommendations on Treaty Land Entitlement* (Saskatchewan, May 1990), 24.

The principles identified in the three treaty land entitlement inquiries conducted by the Commission in relation to the Fort McKay, Kawacatoose, and Lac La Ronge First Nations provide a useful starting point for the analysis in this case. Those principles were based upon a thorough review of the limited case authority on treaty land entitlement and, more significantly, upon the established rules relating to the interpretation of Indian treaties.

In its previous decisions, the Commission has reasoned that the quantum of land a band is entitled to receive to satisfy its treaty land entitlement should, as a general rule, be based on the band's population at the time of the first survey. As we stated in the Fort McKay report:

> 2 The treaty conferred upon every Indian an entitlement to land exercisable either as a member of a band or individually by taking land in severalty. In the case of Indians who were members of a band, *that entitlement crystallized at the time of the first survey of the reserve*. The quantum of land to which the band was entitled in that first survey is a question of fact, determined on the basis of the actual band membership – including band members who were absent on the date of first survey.[80]

What is difficult in each case is determining when the first survey took place and who the members of the band were at the time.

In the Lac La Ronge inquiry, the Commission interpreted the reserve clause in Treaty 6 and considered a number of possible dates and approaches for

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[80] Indian Claims Commission, *Fort McKay First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, December 1995), repr. (1996) 5 ICCP 3 at 53. Emphasis added. It should be noted that, unlike Treaty 6, Treaty 4 does not allow for land to be provided in severalty. However, the general principle providing for the quantum of land to be determined at the time of the first survey is similar under these two treaties, in our view.

calculating treaty land entitlement, including the date of treaty, the date of selection, the date of first survey, and the current date. Although the wording of the reserve clause in Treaty 6 (signed in 1876) is not identical to that contained in Treaty 4, the two are substantially similar. Treaty 6 provides that "the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each Band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them."[81] After considering the various options for calculating entitlement, the Commission made the following conclusions about the interpretation of the reserve clause:

> In our view, the wording of the treaty and the surrounding historical context suggest that the parties intended to carry out the selection and survey of reserves within a short time following treaty to avoid conflicts with settlers over land selections. Despite the absence of clear wording in the treaty or definitive policy guidelines on treaty land entitlement, the general practice of Indian Affairs was to calculate the amount of land to be set aside by counting the number of band members on the most recent treaty annuity paylist available to the field surveyor at the time of the survey. If the parties had intended to use the populations of Indian bands at the time of the treaty to determine land entitlement, this could have been easily accomplished by attaching a schedule to the treaty listing the respective population figures for each band that signed treaty. The fact that Indian Affairs lacked reliable information on band population figures at the time of treaty suggests that such an interpretation was not intended by the parties.
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> . . .
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> In our view, the most reasonable interpretation of the reserve clause is that every treaty Indian is entitled to be counted – once – for treaty land entitlement purposes, and that the parties intended to determine the size of Indian reserves by reference to a band's

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[81] For comparative purposes, the wording of the reserve clause in Treaty 4 is set out on pages 14 and 59 of this report.

> population on or before the date of first survey. This interpretation is supported by the wording of the reserve clause itself, by the statements made by the parties during the treaty negotiations, and by the subsequent conduct of the parties relating to the selection and survey of reserves. We reiterate that this conclusion is consistent with the principles outlined in the Commission's Fort McKay and Kawacatoose Reports. These reports provide that all treaty Indians, including "late additions," are entitled to be counted for entitlement purposes, even if they join a band after its full land entitlement has been set aside.
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> *In general, we agree with the statement in the 1983 [Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims] that, "although the treaties do not clearly identify the date for which a band's population base is to be determined for the land quantum calculations the most reasonable date is not later than the date of first survey of land." Depending on the facts of any given case, it may be necessary to consider many questions in selecting the date on which a band's population should be assessed, including the specific terms of treaty, the circumstances surrounding the selection of land by the band, delays in the survey of treaty land, and the reasons for those delays.*[82]

Taking into account its findings and recommendations in the Fort McKay and Kawacatoose inquiry reports, the Commission summarized its findings on the nature and extent of the Crown's obligations by setting out six principles, which provide a useful analytical approach for dealing with treaty land entitlement claims:

1 The purpose and intention of the treaty is that each band is entitled to 128 acres of land for each member of the band, and every treaty Indian is entitled to be counted in an entitlement calculation as a member of a band.

2 *For a band without reserves, the quantum of land entitlement crystallizes no later than the date of the first survey and shall be*

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82 Indian Claims Commission, *Lac La Ronge Indian Band Report on Treaty Land Entitlement* (Ottawa, March 1996), repr. (1996) 5 ICCP 235 at 316-17.

based on the actual band membership, including band members who were absent at the time of the survey.

3 If the band received its full land entitlement at date of first survey, Canada's treaty obligations are satisfied, subject to the principle that "late additions" are entitled to be counted for entitlement purposes.

4 If a band did not receive its full entitlement at the date of first survey, or if a new or additional shortfall arose as a result of "late additions" joining the band after first survey, the band has an outstanding treaty entitlement to the shortfall acreage, and Canada must provide at least this amount of land in order to discharge its obligation to provide reserve lands under treaty.

5 Canada's failure to provide the full land entitlement at date of first survey, or subsequently to provide sufficient additional land to fulfil any new treaty land entitlement arising by virtue of "late additions" joining the band after first survey, constitutes a breach of the treaty and a corresponding breach of fiduciary obligation. A breach of treaty or fiduciary obligation can give rise to an equitable obligation to provide restitution to the band.

6 Natural increases or decreases in the band's population after the date of first survey have no bearing on the amount of land owed to the band under the terms of treaty.[83]

While the Commission has not completely ruled out the possibility that other dates might be more appropriate depending on particular facts in other cases, we continue to endorse the general principle that the population on the date of first survey should be used to calculate treaty land entitlement unless there are unusual circumstances which would otherwise result in manifest unfairness. In our view, every claim must be assessed on its own merits, but it is also important to develop and apply a consistent set of principles on treaty land entitlement to avoid the

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[83] Indian Claims Commission, *Lac La Ronge Indian Band Report on Treaty Land Entitlement* (Ottawa, March 1996), repr. (1996) 5 ICCP 235 at 318-19.

problems that have resulted from frequent changes in government practices and policies over the last century. Not only have these changes frustrated the settlement of outstanding entitlement claims, but the application of *ad hoc* and inconsistent criteria has created inequities and a profound sense of injustice among First Nations.

Having identified the Commission's general principles relating to treaty land entitlement, we must consider whether the particular wording of Treaty 4 or the understanding of the treaty signatories justifies an interpretation and approach other than date of first survey. Kahkewistahaw submitted that "the correct interpretation of Treaty 4 provides that the area of the reserve is to be determined at the time the First Nation selects a reserve and communicates their desire to the officers of the Crown who have been appointed for the purposes of assigning reserves to the Indians. . . . It is the process of selection that determines the First Nation's Date of First Survey, not the date when the survey of a reserve is actually completed."[84] Counsel relied on the wording of Treaty 4 and the principles of treaty interpretation as support for the following submissions:

(a) A fair, large and liberal interpretation of Treaty 4 indicates that it is when the First Nation selects a reserve that the size of the reserve was to be determined.

(b) It would be the natural understanding of the Indians that the size of the reserve would be determined at the time that the reserve was selected by the First Nation based on the population at that time, not at some later point in time when a survey was concluded.

(c) Canada drafted the terms of Treaty 4 which were presented to

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[84] Submissions on Behalf of the Kakhewistahaw First Nation, February 16, 1996, p. vii.

> the Indians on a take-it-or-leave-it basis. Therefore, the *contra proferentum* rule requires that any lack of clarity, errors or omissions in the drafting of the terms in Treaty 4 are to be interpreted against Canada.
>
> (d) Kahkewistahaw's interpretation of Treaty 4 is a reasonably [sic] construction of Treaty 4. Canada's construction of Treaty 4 is clearly prejudicial to the Indians, therefore, Kahkewistahaw's construction should be accepted.
>
> (e) Canada's prior conduct has clearly indicated that the Date of First Survey is the date of the initial or first "selection" of land by the First Nation and certainly not later than the date land was "first surveyed" for the First Nation with the First Nation's input as required by Treaty 4.
>
> (f) Kahkewistahaw's interpretation of Treaty 4 would ensure that all Indians receive land and are treated equally, fairly and consistently.[85]

With respect, we do not agree with counsel for Kahkewistahaw that the date of selection is the proper approach to the interpretation of Treaty 4. First, there is nothing in the wording of the treaty or in the subsequent conduct of the parties to suggest that treaty land entitlement should be calculated when the First Nation selected or requested land in a particular location. It is clear that a band's *entitlement* to reserve land arises upon the band signing or adhering to treaty. However, the *quantification* and *location* of the band's entitlement are not triggered until certain procedures described in the treaty are carried out. Under Treaty 4, "*such reserves [are] to be selected* by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, *after conference with each band of the Indians*." In our view, the purpose of the "conference" with the band was to

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[85] Submissions on Behalf of the Kakhewistahaw First Nation, February 16, 1996, pp. vii-viii.

ensure that the land to be set aside as reserve met with the approval of the chief and headmen and that it was suitable for its intended purpose (which was typically agriculture in the case of bands in southern Saskatchewan). However, it does not necessarily follow that the band's population on the date of selection should determine the size of the reserve.

In theory, the process of setting apart a reserve should have been straightforward. The band would identify the location it wanted for its reserve and would meet with Canada's officers – often the Indian agent or the surveyor or both – to communicate its choice. There would, in that sense, be a "conference" as contemplated by Treaty 4. If Canada agreed with the band's selection, and assuming there were no conflicting claims for the selected lands, steps would be taken to survey the reserve following a calculation of the band's entitlement. Because Indian Affairs did not maintain comprehensive band lists or reliable census data until about 1951, the band's population would be estimated based on the best information available to the surveyor at that time – including paylist figures, discussions with the chief, the Indian agent and others, and the surveyor's own knowledge of the band. In fact, it was not unusual for the surveyor to provide land in excess of the band's paylist population in situations where the government estimated that a substantial number of band members were absent at the time of the survey.

Based on the best information available, the surveyor would determine the band's population, calculate the area of land to be set aside, run survey lines on the ground, establish monuments to identify the area, document the work in field notes, complete a survey plan, and submit the plan to Ottawa for approval and registration. From the perspective of the band, members could accept the reserve set aside by the surveyor, either expressly by stating their approval or implicitly by residing on and

using the reserve for their collective benefit. Conversely, the band might express its disapproval by objecting to Canada's officers or simply by refusing to live on or use the reserve as surveyed.

It was only when *agreement* or *consensus* was reached between the parties to the treaty – by Canada agreeing to survey the land selected by the band, and by the band accepting the survey as properly defining the desired reserve – that the land as surveyed could be said to constitute a reserve for the purposes of the treaty. Therefore, the date of first survey was significant because, if the band accepted the surveyed land as its reserve, the completion and acceptance of the first survey provided evidence that both parties agreed that the land would be treated as an Indian reserve for the purposes of the treaty.[86] Since the survey is important evidence of Canada's intention to establish a reserve, it is not unreasonable to use the date on the survey plan as the date of first survey for entitlement calculation, provided that the completion of the physical survey of the reserve boundaries can be shown to have coincided roughly with the preparation of the survey plan. Once it has been concluded that a reserve has been set aside, the population must be assessed on this date to determine whether Canada has satisfied the band's treaty land entitlement.

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[86] For the purposes of this inquiry, it was not necessary to consider whether a federal order in council accepting the survey was required before a beneficial interest could vest in the reserve or whether an order in council was required to establish a "reserve" under the *Indian Act*. However, it is interesting to note that the Commission's interpretation is entirely consistent with the interpretation of the treaty offered by the deputy minister of justice on August 12, 1876: "The undersigned leans to the opinion that, the survey and setting out of the reserve having been done with the expressed consent and approval of the Indians and having since been acquiesced in by them, no Order-in-Council is necessary . . ." (Z.A. Lash, signing on behalf of the Deputy Minister of Justice, to the Department of Interior, August 12, 1876, NA, RG 10, vol. 3637, file 6853 (ICC Exhibit 20)).

We are mindful of the six principles of treaty interpretation, which have been defined by the courts and raised by counsel for Kahkewistahaw. We do not agree, however, that those principles drive us inexorably to the conclusions that the First Nation would have us reach. In our view, using the date of first survey as the operative date for calculating treaty land entitlement represents an interpretation that is "fair, large and liberal" and accords with the manner in which the land allocation process would have been understood by the Indians at the time of survey.

We disagree that using the date of first survey rather than the date of selection is "clearly prejudicial to the Indians," or that using the date of selection "would ensure that all Indians receive land and are treated equally, fairly and consistently." It is not accurate to suggest that one approach is universally favourable to the Indians and the other is consistently prejudicial. Calculating a band's population on the date of selection would work to the band's detriment if the band's population was increasing, just as calculating the population on the date of first survey would be disadvantageous if the population was decreasing.

We believe that the Commission's approach is supportable as a fair and reasonable interpretation of Treaty 4. We note in passing that this approach is also consistent with the methodology developed by Canada in the Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims (the 1983 ONC Guidelines), which identify five distinct steps to determine whether a band has received its full land entitlement:

> Determining a Band's treaty land entitlement involves five basic steps:
>
> 1) Identification of the band and the applicable Treaty.
> 2) Determination of the relevant survey date.
> 3) Determination of the total lands received by the band.

4) Determination of the population base.
5) Overall entitlement calculations.

. . .

B Date for Entitlement Calculation

The date to be used in the land quantum calculations is seldom clearly spelled out in any of the treaties. Some of the treaties refer to the laying aside or assignment of a reserve, others mention the selection of land. Legal advice from the Department of Justice suggests that, although the treaties do not clearly identify the date for which a band's population base is to be determined for the land quantum calculations, *the most reasonable date is not later than the date of first survey of land. It is Canada's general view that this is the date to be used to determine whether it has met its obligation under the treaties, to provide a quantum of land to an Indian Band based on the population of that Band at date of first survey.*

Generally the date to be used is taken from the plan of survey of the first reserve set aside for the use and benefit of an Indian Band. This is the date which is noted by the surveyor as the date which he carried out the survey. Other indicators that ought to be noted include the date on which the surveyor signed the plan and the date noted in the surveyor's field book.

In some cases, the date which is chosen for entitlement purposes is not the date of the first actual survey for a band's reserve. A reserve may have been surveyed for the band, but it was never administered as a reserve. Furthermore, if the band rejects the survey and abandons the reserve after the survey, another reserve may be surveyed elsewhere at a later date and confirmed by Order-in-Council. Depending on the facts in each case, this could be considered as the date of first survey. The later survey could be used as date of first survey because this is when the first reserve, officially recognized by Order-in-Council, was set aside for the band.[87]

As the last paragraph implies, where more than one survey has been

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[87] DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, pp. 59-60). Emphasis added.

performed for a given band, a critical issue in determining whether a band's treaty land entitlement has been satisfied is to ascertain which survey is the band's *first* survey. According to the OTC's "Research Methodology for Treaty Land Entitlement (TLE)" guidelines, the "first survey" can be identified by:

- determining whether the reserve was surveyed or located in conformance with the terms of the treaty – in this case, following consultation between Canada's officers and the band as required by Treaty 4;
- determining whether the survey or allotment was acceptable to the band; and
- determining whether the survey or allotment was accepted by Canada.[88]

A completed survey verifies the precise *location* and *size* of a reserve, and is critical in measuring whether a band's treaty land entitlement has been fulfilled. A completed survey does not necessarily confirm, however, that the "first survey" of a band's reserve has *occurred*, particularly where the band rejects the lands as surveyed.

Therefore, we find the most reasonable conclusion to be derived from the interpretation of Treaty 4 is that the date of first survey is the appropriate date for calculating treaty land entitlement. We interpret the Crown's obligation under Treaty 4 to be the allocation of 128 acres of land for each band member at the time that land was *set apart* as a reserve for the use and benefit of the band. It was only

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[88] Office of the Treaty Commissioner, "Research Methodology for Treaty Land Entitlement (TLE)," 1994 (ICC Exhibit 20). Section C of this document was separately produced in this inquiry as ICC Exhibit 14.

when land was *surveyed* by Canada in accordance with the treaty, and *accepted* by the band, that it could be said that the land was properly set apart. Therefore, subject to exceptions being made in unusual circumstances which would otherwise result in manifest unfairness, the general rule is that the population on the date of first survey shall be used to calculate a band's treaty land entitlement.

Having concluded that the appropriate date for calculating Kahkewistahaw's treaty land entitlement is the date of first survey, the Commission must determine which survey constituted the "first survey" for Kahkewistahaw. Once that determination has been made, identifying the date of first survey will be relatively straightforward.

Kahkewistahaw's First Survey

Canada's position is that the 1880 survey by Johnson was never completed, and that Nelson's survey in 1881 was an entirely separate process. It maintains that Nelson's work should be considered the true first survey because it actually resulted in the reserve that was set aside for Kahkewistahaw. Alternatively, counsel argued that reserve selection was an ongoing negotiation, which culminated in 1881 when the final reserve boundaries were surveyed by Nelson. Counsel for Kahkewistahaw, however, considered that, subject to "adjustments" by Nelson in 1881, the selection and survey work in 1880 constituted the first survey.

In reviewing this claim, we have closely considered the following statement from the OTC's research guidelines:

> Some bands have had several reserves, and were moved either at their own request or at that of the government. Sometimes the band never settled on the earlier reserves. *What you need to find is the reserve*

> *which was actually used by the band, and agreed to by them. If the boundaries were later "adjusted," it must be determined whether the adjustment really constituted a new survey of a new reserve, or just a change in the boundaries of a reserve essentially in the same location.* . . .[89]

There is little doubt that, to some extent at least, specific land was identified and selected by the Kahkewistahaw First Nation during a "conference" with Indian Agent McDonald in 1880. McDonald was authorized and instructed to encourage bands to select reserves and settle on them. Patrick and Johnson were authorized and instructed to survey the reserves of those bands desiring them. Based on a preponderance of the evidence before us, it appears that Johnson commenced but likely did not complete or forward any plan of survey to Ottawa for approval, and, therefore, the land identified in 1880 was never formally approved as reserve by the Superintendent General of Indian Affairs or the Minister of the Interior.

This conclusion is supported by the following three pieces of correspondence. First, Indian Agent McDonald reported on January 3, 1881, that the Crooked Lake reserves for O'Soup's Band and Kahkewistahaw were "to be completed." Second, in Patrick's December 16, 1880, year-end report, he stated that Johnson had not yet reported on the surveys at Crooked Lake. In mid-June 1881 Patrick submitted his plans and field notes to Ottawa for a number of reserves, including O'Soup's Band, but no plan was forwarded for Kahkewistahaw. This fact tends to confirm that, if Johnson had surveyed the Kahkewistahaw reserve in 1880, Patrick would have submitted the plan and field notes to Ottawa for approval or, if the only step which

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[89] Office of the Treaty Commissioner, "Research Methodology for Treaty Land Entitlement (TLE)," 1994, pp. 2-3 (ICC Exhibit 20). Emphasis added.

remained was the completion of the survey plan itself, he would have made at least some mention of the area involved.

Third, after Nelson completed his survey in 1881, he reported on January 10, 1882, that he had "adjusted" the reserves, but that no plans from the previous year had been available. More to the point, Nelson's report suggests either that no reserve had been set aside for Kahkewistahaw in 1880, or that the adjustments made to the 1880 survey were substantial:

> After much planning as to the best manner of adjusting these reserves, it was decided to cut five miles off the lower part of O'Soup's reserve so as to give Ka-Kee-wistahaw a frontage on the river, and some of the bottom lands where they had already commenced farming, Ka-Keewistahaw's Band have now a good reserve, and a fair share of the timber in the gulches leading to the river.[90]

Counsel for Canada asserted that the appropriate government authority could not have approved Johnson's work because no survey laid out the precise whereabouts of the land that had presumably been selected by the First Nation. To this, counsel for Kahkewistahaw replied:

> Now to us the boundaries may not be identifiable because we can't find the survey plan of the 1880 survey, but *that doesn't mean that they weren't identifiable to the First Nation and to McDonald*. Certainly when the First Nation would have made its selection they would have said we want this area, and McDonald would have said okay, this is going to be your reserve right here, and just because we don't have boundaries doesn't mean that they didn't know where the reserve was

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[90] John C. Nelson, Surveyor, Department of the Interior, to Edgar Dewdney, Superintendent General, Department of Indian Affairs, January 10, 1882, NA, RG 10, vol. 3573, file 154, pt. 2 (ICC Documents, pp. 35-38, 241-42, 319-20).

> at that time, and certainly we have clear indication from McDonald that they had went [sic] on to their reserve, and I think that the facts have to speak for themselves in this situation.[91]

Counsel for Kahkewistahaw drew attention to the fact that Nelson referred to his survey work in 1881 as "adjusting" reserves "already surveyed." Although Nelson did not have plans of the work done by Patrick and Johnson the previous year, it is fair to say that he probably knew where those boundaries were located. The First Nation argued, moreover, that Canada administered the land selected in 1880 as a reserve for almost a year:

> COMMISSIONER PRENTICE: What do you mean it had been administered as a reserve?
> MR. PILLIPOW: Well it was referred to as a reserve, and the Indians were living on it. The members of the First Nation were living on it, were building homes on it, were cultivating the soil on it, would be providing rations on it and were basically - it was basically their reserve.[92]

In our view, this conclusion is not borne out by the facts in this case. Although some survey work had been done in 1880, there is no evidence of where Johnson located the boundaries. Even if there was sufficient evidence to establish that the reserve had been identified with some certainty by Kahkewistahaw and the Indian Agent in 1880, Nelson's report confirms that the First Nation did not accept that land as its reserve. Nelson stated that he had to "cut off" five miles from

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91 ICC Transcript, February 22, 1996, pp. 173-74 (Stephen Pillipow). Emphasis added.

92 ICC Transcript, February 22, 1996, p. 173 (Stephen Pillipow).

O'Soup's reserve to provide Kahkewistahaw with frontage on the river and to include lands already being farmed by some of the First Nation's members.

Counsel for Canada argued that Nelson's changes to the Kahkewistahaw reserve in 1881 resulted from a request by the First Nation and additional consultations with Canada.[93] While it is not entirely clear from the historical record whether Kahkewistahaw was one of the chiefs who had requested a change, this is a reasonable inference to draw considering, first, the First Nation's lack of river frontage in 1880, and, second, the fact that its members were farming on lands that were not included within the boundaries of the reserve prior to Nelson's "adjustments" in 1881. Furthermore, the subsequent conduct of the First Nation shows that it accepted the reserve laid out by Nelson in 1881, and there is no evidence before the Commission to the contrary.

It is likely that no one will ever know the extent of the work completed by Johnson in 1880. It may be that, without working papers from Patrick or Johnson, Nelson had to start from scratch and conduct the entire survey over again. However, even if a reserve had been laid out by Johnson in 1880 and both Indian Agent McDonald and the First Nation could identify it with some precision, the question remains whether the changes implemented in 1881 by Nelson constituted, in the words of the OTC, "a new survey of a new reserve, or just a change in the boundaries of a reserve essentially in the same location." Canada argued that the changes were significant:

> Although Nelson uses the phrase "adjusting these reserves," suggesting reserves already existed, we submit that on balance the quotation

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93 ICC Transcript, February 22, 1996, pp. 149-50 (Bruce Becker).

> suggests a major re-working of the very sketchy work done the previous fall. Firstly, he had no plans from the previous work, perhaps suggesting that none existed. Secondly, he felt compelled to make a "reconnaissance of that part of the Qu'Appelle River" and "thoroughly examine the country." Surely, if he was making only minor adjustments to an existing reserve no such detailed preparation would be required. Thirdly, he refers to his work as making "new reserves"; again suggesting he was doing more than simply making minor adjustments.[94]

According to counsel for the First Nation, Nelson's report confirmed that he was merely "adjusting" the "already surveyed" Kahkewistahaw reserve and was not performing a completely new survey.

In our view, the evidence before us demonstrates that the adjustments made by Nelson were considerable. We have had regard for Canada's arguments on this point, but more telling, we believe, is Nelson's report of the decision "to cut five miles off the lower part of O'Soup's reserve so as to give Ka-Kee-wistahaw a frontage on the river, and some of the bottom lands where they had already commenced farming." When this statement is considered in the context of the sketches by Kenneth Tyler and Jayme Benson comparing the proposed 1880 survey by Patrick and Johnson with Nelson's 1881 survey, it is apparent that Nelson's work added or substituted an area of 20 to 25 square miles in relation to a reserve that ultimately totalled slightly more than 73 square miles. This represents approximately one-third of the total area reserved for the First Nation in 1881. We consider a change of this magnitude to be substantial.

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[94] Submissions on Behalf of the Government of Canada, February 15, 1996, p. 7.

The adjustment made by Nelson was substantial not only in terms of *location*. It also enhanced the *value* of the reserve from Kahkewistahaw's perspective because the new boundaries included frontage on the Qu'Appelle River, "timber in the gulches leading to the river," and land already being farmed by the First Nation.

We also find that the Kahkewistahaw First Nation did not consider the proposed 1880 survey to be "acceptable" in the sense that Kahkewistahaw and Canada had agreed to treat the land identified by Johnson as a reserve for the purposes of Treaty 4. The additional 20 to 25 square miles of "bottom lands," where some of the First Nation's members were farming in 1881, were clearly outside the area earmarked the preceding year. We cannot agree with counsel for Kahkewistahaw that the proposed 1880 reserve was administered by Canada as a reserve for almost a year because the members of the First Nation "were living on it, were building homes on it, were cultivating the soil on it." Nelson's report shows the opposite to be true.

Even if Patrick and Johnson *had* finished the 1880 survey, complete with monuments and a registered survey plan, it would not have constituted the First Nation's first survey any more than the 1876 survey by Wagner. The existence of a survey plan would not change the fact that Kahkewistahaw did not accept the area surveyed by Patrick and Johnson and that some members had already moved into the adjoining 20 to 25 square miles by the time Nelson arrived.

As a result, we conclude that the work by Patrick and Johnson in 1880 did not constitute the "first survey" for the Kahkewistahaw First Nation. Rather, Nelson's survey in 1881 must be considered the true "first survey" for the purposes of Kahkewistahaw's treaty land entitlement calculation. The subsequent conduct of

the parties confirms that they agreed to treat the 1881 survey as the First Nation's reserve under Treaty 4. Although the Commission does not make any findings on whether a federal order in council is necessary before an Indian reserve can be created, the fact that the survey plan submitted by Nelson was accepted by Canada by means of an Order in Council provides evidence that the Crown agreed to the reserve surveyed by Nelson in 1881. From the First Nation's perspective, it is important to note that Chief Kahkewistahaw and his people did not object to, and did not refuse to live on or use, the reserve as surveyed. In our opinion, the parties reached a consensus and agreement that the reserve surveyed by Nelson represented the First Nation's selected reserve under Treaty 4.

To pinpoint the date of the first survey, we rely again on the following excerpt from the 1983 ONC Guidelines:

> Generally the date to be used is taken from the plan of survey of the first reserve set aside for the use and benefit of an Indian Band. This is the date which is noted by the surveyor as the date which he carried out the survey. Other indicators that ought to be noted include the date on which the surveyor signed the plan and the date noted in the surveyor's field book.[95]

The date on the plan of survey in this case is August 20, 1881, and we conclude that this represents the best evidence of the First Nation's date of first survey. Neither of the parties proposed an alternative date in 1881, nor are we aware of any other date from around the time of Nelson's survey that would be preferable. As we stated earlier in this report, it is not unreasonable to use the date on the survey plan

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[95] DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, p. 60).

for the effective date of first survey because it was on this date that the land was effectively set aside as reserve and the parties agreed to treat the land as reserve.

ISSUE 2: KAHKEWISTAHAW'S TREATY LAND ENTITLEMENT POPULATION

What is Kahkewistahaw's population for treaty land entitlement purposes?

General Principles

Since we have concluded that the date of first survey for Kahkewistahaw was August 20, 1881, the next task is to determine the First Nation's relevant population at that time. Moreover, while the date-of-first-survey population is the starting point for determining the acreage of land to which the First Nation became entitled, it must be borne in mind that any absentees on the date of first survey (including those who were paid arrears for that year), as well as "late additions," such as new adherents and landless transferees who joined the First Nation after August 20, 1881, also became entitled to be counted for treaty land entitlement purposes. However, the entitlement of these absentees and "late additions" arose only if they or their direct ancestors had not been included in another band's treaty entitlement count.

Counsel for both Kahkewistahaw and Canada referred to the treaty annuity paylists from 1879 to 1881 as the focal point of their analyses to determine the First Nation's date-of-first-survey population. Although a treaty paylist provides useful evidence of a band's population at a relevant point in time, it must be remembered that the paylist is simply the *starting point* in determining a band's population for treaty land entitlement purposes. The paylist must be recognized as merely an

accounting of treaty annuities paid to individuals under a given chief, and not necessarily as an accurate census of band *membership*. As stated by counsel for the First Nation:

> We fully recognize that the paylist has shortcomings, but it is the best evidence right now that we have on what a population of a First Nation would be at any particular time, so that would be the starting point. . . .[96]

Similarly, Peggy Martin-Brizinski testified:

> Q. So it [the paylist] wouldn't depict an accurate picture of the band's total membership, population, for any particular time?
>
> A. P. MARTIN-BRIZINSKI: No, I don't believe that it does and the more we learn about this I think the more it becomes clear. For example, the elders have pointed out that there may very well have been band members who, for various reasons, were unable to go to these places of the annuity payments, given the circumstances of [the] time, the distance to travel, the difficulties of travel, and that they simply may not have shown up on those annuity pay lists. In addition to which, we really don't know a lot, in retrospect, about what band membership meant at that period of time and again, this was an accounting procedure on these pay lists and it was not meant to take an accurate count of people, nor was it meant to comment on membership.[97]

In each case, the paylist analysis is important to establish the band's *actual membership* – including band members who were absent at the date of first survey

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[96] ICC Transcript, February 22, 1996, p. 49 (Stephen Pillipow).

[97] ICC Transcript, May 25, 1995, pp. 292-93 (Peggy Martin-Brizinski).

– and not simply the number of people who happened to be counted with the band in a given year. All available evidence that tends to establish or disprove the membership of certain individuals with a band should be considered and weighed. In other words, the base paylist is simply *prima facie* evidence, which is subject to rebuttal.

Kahkewistahaw asserted that, even if 1881 was the date of first survey, the appropriate paylist to be used to determine the First Nation's date-of-first-survey population is still the 1880 paylist. Nelson would have had access to this paylist prior to commencing his survey in 1881 and likely used it to determine the area of the reserve. Moreover, according to counsel for Kahkewistahaw, the evidence confirms that Nelson did not use the 1881 paylist to determine the size of the reserve. Based on Nelson's report on his 1881 survey activities, counsel submitted that Nelson arrived at the Crooked Lake area and began his survey of the Kahkewistahaw reserve *prior* to the treaty annuity payments at Qu'Appelle on August 4, 1881. Even though Nelson was in the general area when the 1881 payments were made, counsel maintained that the evidence shows that he did not have access to the 1881 paylist and did not use that information to determine the size of the reserve. Moreover, since only 186 members of the First Nation were paid at Qu'Appelle in 1881 and Nelson surveyed enough land for 365 people, counsel asserted that it is reasonable to conclude that Nelson did not use the 1881 paylist to determine the size of the reserve. Rather, counsel submitted that the 1880 paylist was probably used by Nelson because the amount of land set aside corresponds closely with the 1880 population figures.

Therefore, Kahkewistahaw submitted that the 1880 paylist should be used as the "base paylist" or starting point for determining the total entitlement of the First

Nation. According to that paylist, 358 individuals were paid under Kahkewistahaw at Qu'Appelle, Maple Creek, and Fort Ellice on July 18, 1880. After Johnson started his survey work near Crooked Lake in late August or early September 1880, an additional 72 individuals were paid under the headman Manitoucan at Fort Walsh in October 1880 for a base paylist total of 430. To this number, counsel submitted that a further 22 members, who were absent or paid arrears in 1880, should be added, for a total of 452 members as of the date of first survey. Based on the arguments and figures presented by counsel for Kahkewistahaw at the inquiry, the First Nation has an outstanding treaty land entitlement of 11,040 acres. As previously noted, this number rises to 29,600 acres if the entitlement of 145 "late additions" identified by Kahkewistahaw in seeking to have its claim accepted for negotiation by Canada in 1992 is established.

Canada's position in this inquiry is that the 1880 paylist is not the appropriate starting point to determine the First Nation's treaty land entitlement. Simply put, Canada maintained that the August 4, 1881, paylist, rather than the 1880 paylist, provides the most accurate reflection of Kahkewistahaw's actual population on the date of first survey (i.e., August 20, 1881). Canada relied on the fact that Nelson was in the Crooked Lake area from July 21 to August 26, 1881, surveying a number of reserves, including one for Kahkewistahaw. Counsel asserted that, since the annuity payments were made on August 4, 1881, it is reasonable to conclude that Nelson had up-to-date information on the First Nation's population figures before he completed his survey. With respect to Kahkewistahaw's submission that Nelson did not use the 1880 paylist because the amount of land surveyed did not correspond with that population base, Canada submitted:

> [T]his is a particularly unfair argument. It amounts to arguing that the fact a surplus of land was provided in 1881 by the Nelson survey is evidence that a shortfall exists. Nelson may have felt it necessary to provide additional lands for other band members who may have been paid at other locations such as Fort Walsh as had happened in previous years. This would not have been an unusual occurrence with the shifting and fluctuating band populations of the day.[98]

Canada relied on the OTC's report on the 1880 survey of the adjacent Cowessess Band to illustrate the point. In that case, only 96 people were members of O'Soup's Band in 1880, but Patrick set aside enough land for three times that population "perhaps in anticipation that some of Cowessess' people would join O'Soup there."[99] Counsel suggested that, in the case of Kahkewistahaw, Nelson may have also had regard for the 1881 paylist, but simply set aside excess lands in consideration of those individuals who were absent at the time of the survey or who were paid at other locations such as Fort Walsh. Since Nelson was undoubtedly aware that 72 people had been paid at Fort Walsh in 1880, he may have speculated that the same thing might occur in 1881.

In the final analysis, Canada asserted that it is not clear which paylist or other information available to Nelson was used to determine the area of the reserve. Canada relied on the testimony of Peggy Martin-Brizinski of the OTC to illustrate the difficulty of ascertaining how decisions were made regarding the survey of reserves at Crooked Lake:

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98 Submissions on Behalf of Canada, February 15, 1996, p. 15.

99 Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, p. 6 (ICC Exhibit 5).

> Well at the time all this is happening, people are leaving the reserves; this is when Nelson arrives to do his surveys and when he gets there a lot of the people simply aren't there at the time of the survey. One of the classic examples of this, when he goes to confer with Agent McDonald in late July, he has to make some decisions, given the absence of a lot of people, what he's going to do, and Agent McDonald apparently advises him to use the 1879 pay list because he believes that you would find a maximum number of people paid in that particular year. So Nelson seems to have been advised to use the 1879 pay list, though this is not the pay list immediately prior to his survey. So this is a case where one doesn't necessarily look at pay list immediately prior to the survey but the best evidence that he may have used another pay list.
>
> However, if you actually look at the size of the reserves that Nelson was surveying it seems possible that he may not have used, in some cases, 1879, he may have used a partial list from 1880, particularly ones from the Qu'Appelle area as opposed to Fort Walsh. *We don't really know what he would have used.* However, in all cases the reserves are surveyed larger than the populations of 1881. The annuity payments are taking place roughly between July 26th and August 20th in the Qu'Appelle and Fort Walsh, Maple Creek payment places. It's possible that he could have had information at the time of the surveys in the field, of what those population sizes were, given the annuity payment. However, if you look at the actual size of the reserve, it doesn't seem at all feasible that he would have paid much attention to that because he's surveying reserves larger than the populations at the annuity payment post. So it seems – when we got into this it seemed more likely that he would have used either 1879 or 1880 population figures to do his assessment.[100]

In light of the fact that the parties took different positions on which paylist should be used as the base paylist to calculate entitlement, we have carefully considered certain comments by counsel for Canada regarding the distinctions

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[100] ICC Transcript, May 25, 1995, pp. 327-28 (Peggy Martin-Brizinski).

between the "objective," "subjective," and "continuity of membership" approaches to paylist selection. In our view, these comments raise the following questions:

1 Assuming that a single base paylist should be used, should the base paylist be the paylist closest in time to the date of first survey (even if that paylist *followed* the date of first survey), the paylist immediately preceding the date of first survey, or the paylist that was actually relied upon by the surveyor?

2 Alternatively, should a multiple-year method such as the "continuity of membership" approach or some form of averaging be used to derive a more realistic and consistent population during this period when the First Nation's paylist population was so widely variable?

Counsel for Canada described the objective approach to paylist selection in these terms:

> Objectively if the goal is to determine the population of the band when the reserve is surveyed for it, then we would not look at the 1879 paylist even though it's – you're sure that those are the people that the reserve was surveyed for. You would look at the paylist closer to the time of the actual survey because it would be more – more relevant in terms of what the population was when the survey occurred.[101]

In essence, the objective approach uses the paylist that represents the "best evidence" of the band's population at the date of first survey, regardless of whether the survey preceded or followed the payment of annuities. Therefore, one possible outcome of this approach is that, if the survey *preceded* the payment of annuities in a given year, the surveyor would not have had the benefit of knowing what the base paylist population *would be* when he conducted his survey.

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101 ICC Transcript, February 22, 1996, p. 162 (Bruce Becker).

The subjective approach, which was implicit in the position of the First Nation, focuses on the most recent paylist to which the surveyor had access, or on some other paylist on which it can be shown that the surveyor actually relied. The apparent advantage of the subjective approach is that it may result in a higher correlation between a given paylist population and the quantum of land actually surveyed for the band. The obvious disadvantage is that the paylist may have been out of date when the reserve was surveyed, which could result in the reserve's size bearing little or no relationship to the band's population at the date of first survey.

An alternative to these two methods – the continuity-of-membership approach – may have some appeal in a case such as this because the First Nation's population diverged so widely from year to year. The theory behind the approach is to focus on those members of the community who consistently appeared on the paylist over a number of years, instead of choosing a particular paylist in which the population "spiked" either upward or downward. According to counsel for Canada, the major drawback to using continuity of membership is that, without a base year to use as a starting point, "you move away from the idea of being able to say with certainty who was counted."[102] The same advantages and disadvantages presumably apply to averaging, with the added concern that an average can be skewed depending on the years averaged – meaning that the resulting figure may not be representative of a band's population at all.

The Commission concludes that the objective approach is the most logical choice among these options because the purpose of paylist analysis is to "obtain as accurate a population of the band as is possible on the date that the reserve was first

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102 ICC Transcript, February 22, 1995, p. 161 (Bruce Becker).

surveyed."[103] Each case must be assessed on its own merits based on the historical information available. In Kahkewistahaw's case, the August 4, 1881, paylist provides the most reliable evidence of the First Nation's population as of the August 20, 1881, date of first survey. Whether or not Nelson had access to this information before he completed his survey on August 20, 1881, is a "red herring," since the real question is the First Nation's actual population on the date of first survey. In this case, there can be no doubt that the 1881 paylist provides the most accurate reflection of Kahkewistahaw's population on the date of first survey.

We recognize that using a subjective approach – either the paylist immediately preceding the date of first survey, or the paylist on which the surveyor actually relied – has a strong appeal since the focus is on the work done by the surveyor relying on information actually available to him. Counsel for the First Nation also used arguments made by the Ochapowace First Nation in support of a subjective approach: first, that the approach is based on "the best information available, recorded at the time by the people that had the responsibility to make the decision"; and, second, that a "fair, large and liberal construction in favour of the Indians" requires the selection of the "population at last annuity payment prior to survey."[104]

The central question in this inquiry is whether sufficient reserve land was set aside for each and every member of the Kahkewistahaw First Nation on August 20, 1881. In determining whether the Crown discharged its treaty obligations, we are

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[103] DIAND, "Office of Native Claims Historical Research Guidelines for Treaty Land Entitlement Claims," May 1983 (ICC Documents, p. 61).

[104] William J. Pillipow to Emil Korchinski, Office of the Treaty Commissioner, November 23, 1990 (ICC Documents, pp. 47-48).

less concerned with what the officers "responsible to make the decision" actually *did* than with what they were *obliged* to do under the terms of Treaty 4. The issue is how the treaty should be interpreted to establish a band's population. It is logical that the parties to the treaty would have expected land to be allocated on the basis of a population that was current on the date of the survey because this was the date when the land was effectively set aside for the use and benefit of the band. It is not reasonable to suggest that the parties to treaty intended the size of an Indian reserve to be determined by population figures that were several months out of date and, therefore, unreliable. Although the responsible officers may have used readily available historical statistics, they should have used current population statistics. If current statistics were not yet available, they could have conducted an independent count or made the reserve selection subject to adjustment.

In the case of some Treaty 4 bands like Kahkewistahaw, for example, many band members chose not to live on the reserves but to pursue the buffalo and a traditional way of life for as long as they could. Thus, when Nelson surveyed the reserves at Crooked Lake in 1881, there is evidence to suggest that he may have been aware that many band members were absent. As a result, he considered it appropriate to set aside land in excess of each band's entitlement (based on 1881 population figures) on the assumption that some members were absent and would later rejoin their respective bands.

The First Nation's other argument is that a "fair, large and liberal construction in favour of the Indians" requires the use of the subjective approach based on the paylist immediately preceding the selection of land. We disagree. We believe that a fair, large, and liberal construction should still yield a consistent principle that can be applied in all cases, rather than yielding results that are

consistent only because they are invariably to the benefit of First Nations. If the Commission and the parties were to choose one of the subjective approaches and apply it uniformly in all cases, the approach chosen might benefit some bands while operating to the detriment of others, depending on the circumstances involved.

Employing the objective approach, the paylist closest in time to August 20, 1881 – when Nelson completed the survey of the reserves that were acceptable to both Canada and Kahkewistahaw – was the paylist of August 4, 1881. In our view, subject to adjustments being made for absentees and "late additions," this paylist represents the best evidence of Kahkewistahaw's population as of the date of first survey. Proximity in time is particularly important in cases like this in which significant population swings quickly rendered the figures in earlier paylists unreliable as indicators of Kahkewistahaw's population at first survey.

In any event, the 1881 paylist satisfies both the objective approach and a subjective approach since it is clear from Nelson's interim report dated August 14, 1881, and his plan dated August 20, 1881,[105] that Nelson did not complete his survey until some two weeks *following* the payment of annuities. The 1881 paylist was readily available and should have been used by Nelson to determine the size of the reserve. If Nelson did not use this paylist information, this oversight actually operated to the benefit of Kahkewistahaw because Nelson set aside approximately twice the amount of land than would have been justified by the First Nation's base paylist population of 186.

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[105] J.C. Nelson, "Sketch showing Indian Reserves on Crooked and Round Lakes," August 20, 1881 (ICC Documents, p. 247).

Conclusions Regarding Kahkewistahaw's Treaty Land Entitlement

Applying the principles outlined above to the facts in this case, the Commission concludes that the date of first survey for the Kahkewistahaw First Nation was August 20, 1881. Given the close proximity in time between the date of the survey and the treaty annuity payments to Kahkewistahaw on August 4, 1881, the 1881 paylist is the proper starting point for the entitlement calculation because it provides the best evidence of Kahkewistahaw's actual date-of-first-survey population. According to the paylist information available for 1881, there were 186 members of the First Nation paid at Qu'Appelle, plus an additional 70 absentees and arrears, for a total date-of-first-survey population of 256 members. Since enough land was set aside for 365 individuals, Kahkewistahaw has not established an outstanding date-of-first-survey shortfall. Rather, there was a surplus of 14,048 acres representing sufficient land for more than 109 individuals who were not present in 1881.

We emphasize, however, that our analysis does not include any "late additions," such as new adherents and landless transferees, who may have joined Kahkewistahaw after the date of first survey and would have thereby become entitled to be included in the First Nation's entitlement calculation. Since the paylist research conducted to date has been premised on the assumptions that (a) 1880 was the date of first survey, and (b) the 1880 paylist is the appropriate base paylist, we have no reliable figures on how many "late additions" should be included in Kahkewistahaw's total entitlement count. Although it is possible that Kahkewistahaw may be able to establish an outstanding entitlement claim, this will be a difficult threshold to achieve since the First Nation would have to show that an additional 109 new adherents or landless transferees joined it after 1881.

Finally, before addressing the issue arising from the Saskatchewan Treaty Land Entitlement Framework Agreement, it is necessary to deal with two additional considerations. The first is whether there are unusual circumstances in this case that would result in manifest unfairness unless we make an exception to the general rule that the population as of date of first survey shall be used to calculate treaty land entitlement. We conclude that such an exception is not warranted. The facts in this case suggest that Canada's officials acted in good faith when they took steps to set aside a land base in accordance with the treaty for the benefit of the First Nation. Canada's surveyors consulted and conferred with Chief Kahkewistahaw and his people, and undertook to ensure that the First Nation had river frontage, timber, and good agricultural land for its future needs. The land that was ultimately surveyed and set aside as Indian Reserve 72 was fit for agricultural purposes and met with Kahkewistahaw's approval. Although the First Nation's population peaked in 1880, it has not been established that the 1880 number was representative of the true population base for Kahkewistahaw. Despite evidence that the First Nation's paylist population in 1881 was only 186, Canada's officials nevertheless surveyed enough land for 365 people. Since Canada set aside more land than the treaty formula prescribed, one can only presume that it did so either owing to the surveyor's inadvertence or his assumption that others would join Kahkewistahaw after the reserve was surveyed. In either event, the result worked to Kahkewistahaw's benefit.

The second consideration we must address is the relevance of the relationship between Kahkewistahaw and Nekaneet in this inquiry. According to Canada, it is not appropriate to use 1880 as the date of first survey because the 1880 paylist included many members of Nekaneet's Band who were later recognized as a

separate band and whose descendants received a substantial treaty land entitlement settlement in 1992:

> Nekaneet was paid under Kahkewistahaw in 1879 and 1880. In 1881 and 1882 Nekaneet and a significant number of others on the 1880 Kahkewistahaw list were paid separately under Nekaneet (ICC 80 and Exhibit 5 page 9). We cannot be sure of the exact number, but much of the decline in Kahkewistahaw's population between 1880 and 1881 is accounted for in this migration. Most of those who left after 1880 were paid for only one year with Kahkewistahaw. Those who left with Nekaneet did in fact receive their own reserve in the Cypress Hills area and the Nekaneet Band recently received a significant treaty land entitlement settlement (more than $8 million). Accordingly, Canada has dealt with its treaty land entitlement obligations as they relate to those individuals who left Kahkewistahaw under Nekaneet between 1880 and 1881. Undoubtedly, others that left that year have also been counted with other bands. To use the 1880 population would require Canada to provide land for these individuals twice.[106]

Counsel for Kahkewistahaw acknowledged that many of Kahkewistahaw's members were in the Cypress Hills with Nekaneet in 1881 and 1882 but asserted that these individuals should have been included in Kahkewistahaw's population base for entitlement purposes. In support of this view, counsel referred to a letter dated December 20, 1884, in which Indian Commissioner Edgar Dewdney advised the Superintendent General of Indian Affairs that Nekaneet's request for a reserve had been rejected on the grounds that Nekaneet was not a chief and his "followers" had already received treaty land entitlement under other chiefs.[107]

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[106] Submissions on Behalf of the Government of Canada, February 15, 1996, pp. 5-6.

[107] Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, pp. 74-75.

Since we have concluded that the 1881 paylist provides the best evidence of Kahkewistahaw's date-of-first-survey population, this point has been rendered largely academic. In any event, although it is reasonable to conclude that some Kahkewistahaw *members* counted at Fort Qu'Appelle in 1880 were at Fort Walsh in 1881 and 1882, and were thus absent when the reserve was surveyed, any members who subsequently rejoined Kahkewistahaw became entitled to be included in the entitlement calculation as absentees. Any members in 1880 who switched their affiliations in 1881 and 1882, but later rejoined Kahkewistahaw without being counted as part of a treaty land calculation with another band, became entitled to be included in Kahkewistahaw's treaty land entitlement calculation as landless transfers. The important point is that, for the First Nation to be able to claim treaty land entitlement for absentees and landless transfers, it must be shown that these individuals were not counted with other bands for treaty land entitlement purposes before rejoining Kahkewistahaw.

It must be remembered that treaty annuity paylists do not prove conclusively whether an individual was a *member* of a given band. The treaty annuity paylist was simply an accounting tool used for administrative purposes and is only one source of evidence to be considered. For this reason, we cannot agree with the First Nation's unqualified assertion that individuals paid with Kahkewistahaw in 1880 and with Nekaneet at Fort Walsh in 1881 and 1882 "were members of the Kahkewistahaw First Nation and were included in Kahkewistahaw's population for determining the size of the Kahkewistahaw reserve."[108] There is simply insufficient evidence before the Commission to support or deny this assertion.

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[108] Submissions on Behalf of the Kahkewistahaw First Nation, February 16, 1996, p. 74.

Therefore, even if the Commission had agreed with Kahkewistahaw's submission that it would be appropriate to rely on an 1880 base paylist in this case, we may have had serious reservations about including in Kahkewistahaw's entitlement calculation any individuals paid with Kahkewistahaw in 1880 but subsequently paid at Fort Walsh. This is because there is *prima facie* evidence that a large proportion of Kahkewistahaw's population decline from 1880 to 1881 can be accounted for by the migration of individuals to the Cypress Hills. With respect to those people who were paid only once with Kahkewistahaw – on the 1880 paylist – one must consider whether they had a sufficient connection or continuity of membership with the First Nation. While it may be appropriate, for entitlement purposes, to include "one time onlys" on the base paylist of a band, all of the "connecting factors" must be taken into account, especially where there are competing equities for including a particular person as a member of one band or another. Since each Indian is entitled to be counted only once for entitlement purposes, it would be necessary to consider whether Nekaneet has a stronger claim to any individuals who were paid annuities with Kahkewistahaw for only one year in 1880 but who thereafter became long-term members of Nekaneet.

Counsel for Kahkewistahaw further contended that, in light of the deaths of many members of the First Nation between 1880 and 1882, the fact that Kahkewistahaw's population rebounded to the extent that it did in the three years following 1882 is evidence that many of the surviving members of the First Nation who were counted at Fort Walsh in 1881 and 1882 subsequently rejoined and settled with Kahkewistahaw. The evidence confirms that many Indians died in 1880 and 1881 as a result of malnutrition, starvation, and disease. There can be no doubt that the conditions facing the plains Indians in the 1870s and 1880s were tragic and were

aggravated by the disappearance of the buffalo and the difficult transition to an agrarian way of life.

However, we note that, although Kahkewistahaw's date-of-first-survey population was 256, including absentees and arrears, Nelson set aside a reserve that was large enough for 365 people, according to the treaty formula. Although the First Nation undoubtedly suffered hardship during these years, it was provided with a surplus of land based on its 1881 paylist population. As we concluded previously, Canada's officials made efforts in good faith to set aside a land base in accordance with the treaty for Kahkewistahaw's benefit. Based on our findings that land was provided for an additional 109 people, if the First Nation can demonstrate that more than this number joined or rejoined it after the date of first survey, then it could perhaps substantiate an outstanding treaty land entitlement. Our review of the population statistics in evidence in this inquiry, however, makes this appear unlikely.

ISSUE 3: SASKATCHEWAN FRAMEWORK AGREEMENT

Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?

As the Commission noted in Part III of this report, the submissions made by the parties in relation to Article 17 of the 1992 Saskatchewan Treaty Land Entitlement Framework Agreement (the Framework Agreement) were virtually identical to those made by the parties (represented by the same counsel) in the Kawacatoose inquiry.

The only difference in the present inquiry is that Kahkewistahaw is seeking validation on the same basis as the Ochapowace and Cowessess First Nations rather than the seven Entitlement Bands relied upon by Kawacatoose.

Since the release of the Kawacatoose report, we remain unchanged in our view that section 17.03 is limited to circumstances in which a band's treaty land entitlement claim has *already* been accepted for negotiation in accordance with the terms of treaty. In other words, section 17.03 applies in the context of *settlement*. It does *not* afford a separate basis for *validation* apart from treaty. It represents an agreement among Canada, Saskatchewan, and the Entitlement Bands that, once a non-Entitlement Band's claim has been accepted for negotiation independently of the Framework Agreement itself, then the settlement of that claim can be dealt with much more expeditiously by avoiding protracted bargaining on points that have already been negotiated.

If we had determined that Kahkewistahaw had an outstanding treaty land entitlement on the basis of Treaty 4 and the principles set forth in the Fort McKay, Kawacatoose, and Lac La Ronge cases, then we would have concluded the claim should be validated. In that event, it would have been our view that Canada and Saskatchewan should extend the principles of the Framework Agreement to a settlement with the First Nation (providing that Kahkewistahaw elected to opt in under section 17.04). However, we have found that Canada owes no obligation under treaty to validate Kahkewistahaw's claim, and thus we also conclude that section 17.03 creates no obligation upon Canada or Saskatchewan to enter into a settlement with Kahkewistahaw in accordance with the Framework Agreement.

Nevertheless, in light of Kahkewistahaw's position that the settlements with Cowesses and Ochapowace constitute some sort of precedent which should bind

Canada's future handling of validation claims, we will review the evidence before us regarding the validations of those Bands with a view to establishing whether their circumstances form the basis of a claim to an outstanding treaty land entitlement.

Cowessess

Cowessess' circumstances can immediately be distinguished in one respect because Patrick and Johnson actually completed the survey and plan of the O'Soup reserve in 1880. However, we have already concluded that, even if a survey plan had been completed for Kahkewistahaw in 1880, the First Nation's date of first survey would still have been 1881 because Kahkewistahaw moved onto adjoining lands and thus did not accept the area surveyed by Johnson. The OTC noted how this differed from Cowessess:

> We are not aware of which survey was accepted for Cowessess by Canada, but believe that there is good reason to use the 1880 O'Soup survey as the first survey, as the trail of evidence clearly indicates the nature and size of the adjustment made by Nelson in 1881. *The O'Soup faction began to live on the reserve in 1880, and to continue to reside there during and after the Nelson survey. There is no indication that O'Soup, unlike the bands formerly located to the north of the river, wanted any relocation in 1881.*[109]

Since the evidence suggests that Cowessess accepted the reserve surveyed in 1880 without any substantial adjustments, the parties agreed that the appropriate date of first survey for Cowessess was 1880 rather than 1881. On these grounds, we consider the Cowessess scenario to be distinguishable from the circumstances

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[109] Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 5 (ICC Exhibit 2). Emphasis added.

surrounding the Kahkewistahaw claim. Kahkewistahaw did not accept the reserve surveyed in 1880, which necessitated substantial adjustments in 1881.

Ochapawace

Ochapowace is very similar to Kahkewistahaw in terms of population trends (high in 1879, peaking in 1880, and plummeting in 1881) and date of first survey (1881), but, although the Ochapowace claim was accepted for negotiation, Kahkewistahaw's claim has been rejected. Since Canada's legal opinion on the Ochapowace claim is privileged and has not been disclosed, it is difficult to ascertain the precise reasons why that claim was validated and settled under the Framework Agreement. However, Canada stated that there are significant differences because Ochapowace was complicated by the informal but "forced" amalgamation of the Kakisheway and Chacachas Bands by Nelson and McDonald in the course of surveying the reserve. As noted by counsel for Canada:

> The Ochapowace situation . . . was the product of a "forced amalgamation" of the Kakisheway and Chacachas Bands. Many of the Chacachas Band members did not want to be a part of the new band and departed. This is why the Band population was so low in 1881 (Note the 1881 Date of First Survey, not 1880). The hardship caused by the amalgamation and the added difficulty of arriving at the populations because of the existence of two separate bands and two separate reserves may have played a significant role in the claim being accepted.[110]

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[110] Submissions on Behalf of the Government of Canada, February 15, 1996, p. 24.

Further background information regarding Ochapowace was provided in the two reports by the OTC. In its May 1995 report, the OTC stated:

> When Nelson did his survey work [in 1881], he and Agent McDonald in Treaty Four seem to have made a decision to place both Loud Voice [Kakisheway] and Chacachas on the same reserve. It is not clear just how the decision was made, but the bands were not involved and there was never any formal amalgamation. In the year of the survey many members of both bands were absent hunting; 11 of Chacachas' members were paid with Kakisheway, and only 43 were paid at Qu'Appelle. When some of the band members came to Crooked Lakes in 1882, they were upset to find that they no longer had their own lands, and they asked for a separate reserve. . . . In 1883 the 107 Chacachas members, then on reserve, were paid separately, but by 1884 the two lists had been combined, thus effecting an amalgamation. Only about 45 band members joined Loud Voice; the others, including Chacachas remained stragglers. . . .[111]

In its report of March 29, 1994, the OTC commented:

> In the case of Ochapowace, we are aware that 1881 has been accepted as the Date of First Survey for the band, based on Nelson's survey. Although we can surmise that there was an 1880 survey, we do not have any evidence of the size or locations of these reserves. Since, however, the survey of 1881 was the first joint reserve that we know of (Chacachas and Kakisheway), there was reason to use 1881 as the [date of first survey] in this case.[112]

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111 Office of the Treaty Commissioner, "Kahkewistahaw Special Report: Surveys and Demographics, Crooked Lakes Reserves, 1876-1884," May 1995, p. 7 (ICC Exhibit 5).

112 Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, p. 4 (ICC Exhibit 2).

That report also makes it evident that, in the 1881 survey by Nelson, Ochapowace received sufficient land for 413 people but was or became entitled to land for 419 people.[113] Notwithstanding the difference of only six people, this represents an outstanding treaty land entitlement and a valid basis for distinguishing the Ochapowace claim, unless Kahkewistahaw can establish that it has sufficient absentees and "late additions" to increase its 1881 entitlement population from the base paylist figure of 186 to a number exceeding 365.

Conclusions Regarding Cowessess and Ochapowace

In conclusion, based on the limited evidence before us regarding the validations of Cowessess and Ochapowace, we find it difficult to conclude that the circumstances of these bands are of any value as precedents to Kahkewistahaw. We do not agree that the First Nation's argument on this point has merit in any event. As we stated in the Kawacatoose report:

> We do not view the suggestion that Canada has gone beyond its lawful obligation in previous validations or settlements as creating new "high water marks" to which, as a minimum, all future validations and settlements must conform, failing which Canada is in breach of its fiduciary obligations to non-Entitlement Bands. The proper basis for validation contemplated by section 17.03 is the basis required by Treaty 4.[114]

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[113] Office of the Treaty Commissioner, "Surveys of the Kahkewistahaw Reserve," March 29, 1994, pp. 5-6 (ICC Exhibit 2).

[114] Indian Claims Commission, *Kawacatoose First Nation Report on Treaty Land Entitlement Inquiry* (Ottawa, March 1996), 190, repr. (1996) 5 ICCP 73 at 217).

Although we are not prepared to make a finding on whether the validations of Cowessess and Ochapowace were properly determined, the real issue in any event is not whether other cases have been differently decided, but whether Kahkewistahaw has a proper claim for outstanding treaty land entitlement under the terms of Treaty 4. We have concluded that it does not.

PART V

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The Commission has been asked to inquire into and report on whether the Government of Canada properly rejected the specific claim submitted by the Kahkewistahaw First Nation. To determine whether the claim is valid, we have had to consider the following issues:

1 What is the appropriate date for calculating Kahkewistahaw's treaty land entitlement?

2 What is Kahkewistahaw's population for treaty land entitlement purposes?

3 Has the First Nation established, pursuant to Article 17 of the Saskatchewan Treaty Land Entitlement Framework Agreement, an outstanding treaty land entitlement on the same or substantially the same basis as the Entitlement Bands, which are party to the Framework Agreement?

Our findings are stated briefly below.

Issue 1: Date for Calculating Treaty Land Entitlement

As a general principle, a band's population on the date of first survey shall be used to calculate treaty land entitlement rather than its population on the date of selection of reserve land. In the case of Kahkewistahaw, the substantial changes made by Nelson in 1881 to the survey work by Patrick and Johnson in 1880 constituted "a new survey of a new reserve," and not "just a change in the boundaries of a reserve essentially in the same location." These changes arose out of Kahkewistahaw's desire to include adjoining agricultural land, river frontage, and timber land in its

reserve. Therefore, the date of first survey was the August 20, 1881, date of Nelson's survey, which was conducted in accordance with treaty and accepted by both Canada and the First Nation.

Issue 2: Kahkewistahaw's Treaty Land Entitlement Population

The paylist that provides the most reliable evidence of a band's population at date of first survey is the paylist closest in time to the date of first survey, at which time the band's treaty land is set aside for the band's use and benefit. Nevertheless, the treaty paylist is simply a *starting point* in determining the band's population for treaty land entitlement purposes, since the paylist must be analysed to establish the band's *actual membership* as opposed to individuals who were simply counted with the band in a given year. The most reliable objective evidence of Kahkewistahaw's population as of the August 20, 1881, date of first survey – and thus the appropriate "base paylist" – was the August 4, 1881, paylist, subject to appropriate adjustments being made for absentees and "late additions," such as new adherents to treaty and transferees from landless bands. Using the 1881 base paylist as the starting point, the evidence shows that Kahkewistahaw had a population of 186, together with 70 absentees and arrears, at the date of first survey. However, all the paylist research was predicated on an 1880 date of first survey, so we do not have any reliable figures on the number of "late additions" to add to this preliminary total of 256. For its claim to be validated, the First Nation must demonstrate that more than 109 absentees, new adherents, or landless transfers – including individuals who may have been counted with Nekaneet at Fort Walsh in 1881 – subsequently joined or rejoined Kahkewistahaw. The Commission believes that this result is fair because the evidence shows that Canada's officials conferred with Chief Kahkewistahaw and

acted in good faith to provide a land base in accordance with treaty, having sufficient river frontage, timber, and agricultural land for the First Nation's future needs.

Issue 3: Saskatchewan Framework Agreement

The only basis upon which a band can establish an outstanding treaty land entitlement claim is in accordance with the legal obligations that flow from treaty. Section 17.03 of the Framework Agreement does not provide Kahkewistahaw with an independent basis for validation of its treaty land entitlement claim. It merely provides non-Entitlement Bands whose claims are subsequently validated by Canada with the opportunity to settle their claims in accordance with the Framework Agreement's principles of settlement. We find that Kahkewistahaw has not established an outstanding entitlement in accordance with treaty, and therefore section 17.03 creates no obligation upon Canada or Saskatchewan to enter into a settlement with the First Nation in accordance with the Framework Agreement. Moreover, the circumstances of Cowessess and Ochapowace are distinguishable and do not afford Kahkewistahaw the basis for a claim to an outstanding treaty land entitlement.

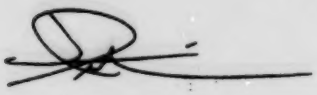
RECOMMENDATION

Having found that the Kahkewistahaw First Nation has failed to establish that the Government of Canada owes an outstanding lawful obligation to provide land to the First Nation under treaty, under the principles enunciated by the Commission in the Fort McKay, Kawacatoose, and Lac La Ronge inquiries, or under the terms of the

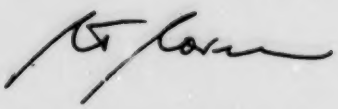
Saskatchewan Treaty Land Entitlement Framework Agreement, we therefore recommend:

> **That the claim of the Kahkewistahaw First Nation with respect to outstanding treaty land entitlement not be accepted for negotiation under Canada's Specific Claims Policy.**

FOR THE INDIAN CLAIMS COMMISSION



P.E. James Prentice, QC
Commission Co-Chair



Carole T. Corcoran
Commissioner

APPENDIX A

KAHKEWISTAHAW FIRST NATION TREATY LAND ENTITLEMENT INQUIRY

1	Decision to conduct inquiry		August 31, 1994
2	Notices sent to parties		September 2, 1994
3	Planning conference		February 1, 1995
4	Community and expert sessions		

By agreement of the parties, a community session was not held in relation to the present inquiry. However, on May 24 and 25, 1995, the panel held joint sessions in Saskatoon, Saskatchewan, with representatives from the Kawacatoose and Ocean Man First Nations, hearing from the following witnesses:

- Kenneth Tyler, Counsel, Constitutional Law Branch, Manitoba Department of Justice
- David Knoll, Counsel, Federation of Saskatchewan Indian Nations
- Dr. Lloyd Barber, chief negotiator for Federation of Saskatchewan Indian Nations for the purpose of negotiating the Saskatchewan Framework Agreement
- James Gallo, Manager, Treaty Land Entitlement and Claims, Lands and Trusts Services, Department of Indian Affairs and Northern Development
- James Kerby, legal counsel to Canada for the purpose of negotiating the Saskatchewan Framework Agreement
- Panel of research experts from the Office of the Treaty Commissioner: Jayme Benson and Peggy Martin-Brizinski

5	Oral submissions	*Saskatoon*	February 22, 1996

6 Content of formal record

The formal record for the Kawacatoose First Nation Inquiry consists of the following materials:

- 37 exhibits tendered during the Inquiry, including the documentary record (1 volume of documents with annotated index)
- Transcripts from expert sessions (2 volumes)
- Written submissions of counsel for Canada and the claimants
- Transcripts of oral submissions (1 volume)
- Authorities and supplemental authorities submitted by counsel with their written submissions
- Correspondence among the parties and the Commission

The report of the Commission and letters of transmittal to the parties will complete the formal record of this Inquiry.